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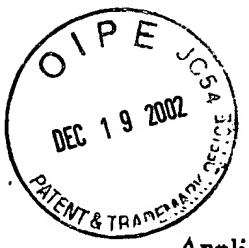

Attorney's Docket No.: 06975-248001

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : David Bill
Serial No. : 09/105,840 Art Unit : 2665
Filed : June 26, 1998 Examiner : Man Phan
Title : DISTRIBUTING PERSONALIZED CONTENT

Commissioner for Patents
Washington, D.C. 20231

CHANGE OF CORRESPONDENCE AND POWER OF ATTORNEY

I hereby appoint the following attorneys and/or agents to prosecute this application and to transact all business in the Patent and Trademark Office connected therewith:

John F. Hayden, Reg. No. 37,640; Michael McKeon, Reg. No. 37,888; Linda Liu Kordziel, Reg. No. 39,732; William E. Booth, Reg. No. 28,933; Ruffin B. Cordell, Reg. No. 33,487; John W. Freeman, Reg. No. 29,066; Timothy A. French, Reg. No. 30,175; G. Roger Lee, Reg. No. 28,963; John B. Pegram, Reg. No. 25,198; Charles C. Winchester, Reg. No. 21,040; James E. Mrose, Reg. No. 33,264; Lauren A. Degnan, Reg. No. 40,584; Andrew F. Bodendorf, Reg. No. 39,537; Diana DiBerardino, Reg. No. 45,653; W. Karl Renner, Reg. No. 41,265; Joseph F. Key, Reg. No. 44,827; Harold H. Fox, Reg. No. 41,498; Scott R. Boalick, Reg. No. 42,337; Joseph V. Colaianni, Jr., Reg. No. 39,948; Gregory A. Walters, Reg. No. 41,366; R. Whitney Winston, Reg. No. 44,432; Mark E. Wadrzyk, Reg. No. 45,187; Heather Morin, Reg. No. 37,336; Phyllis K. Kristal, Reg. No. 38,524; Benjamin D. Driscoll, Reg. No. 41,571; John F. Conroy, Reg. No. 45,485; Thomas A. Rozylowicz, Reg No. 50,620; Shailaja M. Shirodkar, Reg. No. 50,171; Christopher A. Cotropia, Reg. No. 47,501; Mark R.W. Bellerman, Ph.D., Reg. No. 47,419; Kevin Greene, Reg. No. 46,031; and Alexander Franco, Reg. No. 45,753.

☒ A chain of title from the inventors of the patent application identified above, to the current assignee is shown below:

1. An assignment from David Bill to Spinner Networks, Inc. This document was recorded in the Patent and Trademark Office at Reel 9550, Frame 0261.

2. An assignment from Terraflex Data Systems Incorporated to Spinner Networks, Inc. This document was recorded in the Patent and Trademark Office at Reel 9574, Frame 0482.

3. A certificate and agreement of the merger of Adam Acquisition Sub, Inc. with and into Spinner Networks, Inc., dated May 28th and certified by the Delaware Secretary of State. Adams Acquisition Sub, Inc. is a wholly owned subsidiary of American Online, Inc..

4. An agreement and plan of reorganization among American Online, Inc., Adams Acquisition Sub, Inc., and Spinner Networks Incorporated dated May 28th, 1999, wherein American Online, Inc. acquire Spinner Networks, Incorporated.

The undersigned has reviewed the documents in the chain of title of the above-identified application and to the best of undersigned's knowledge and belief, title is in the assignee identified above.

The undersigned (whose title is supplied below) is empowered to act on behalf of the assignee.

Please change the Correspondence Address for the above-entitled application to:

Fish & Richardson P.C.
1425 K Street, N.W.
11th Floor
Washington DC 20005-3500
Telephone: (202) 783-5070
Facsimile: (202) 783-2331

AMERICA ONLINE, INC.

Date: 12/19/02

By: James R. Bramson
Title: Assistant General Counsel and Corporate Vice President

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

FEBRUARY 22, 1999

PTAS

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THE LAW OFFICES OF STEVEN A. SWERNOFSKY
STEVEN A. SWERNOFSKY
P.O. BOX 390013
MOUNTAIN VIEW, CA 94040

UNITED STATES PATENT AND TRADEMARK OFFICE
NOTICE OF RECORDATION OF ASSIGNMENT DOCUMENT

THE ENCLOSED DOCUMENT HAS BEEN RECORDED BY THE ASSIGNMENT DIVISION OF THE U.S. PATENT AND TRADEMARK OFFICE. A COMPLETE MICROFILM COPY IS AVAILABLE AT THE ASSIGNMENT SEARCH ROOM ON THE REEL AND FRAME NUMBER REFERENCED BELOW.

PLEASE REVIEW ALL INFORMATION CONTAINED ON THIS NOTICE. THE INFORMATION CONTAINED ON THIS RECORDATION NOTICE REFLECTS THE DATA PRESENT IN THE PATENT AND TRADEMARK ASSIGNMENT SYSTEM. IF YOU SHOULD FIND ANY ERRORS OR HAVE QUESTIONS CONCERNING THIS NOTICE, YOU MAY CONTACT THE EMPLOYEE WHOSE NAME APPEARS ON THIS NOTICE AT 703-308-9723. PLEASE SEND REQUEST FOR CORRECTION TO: U.S. PATENT AND TRADEMARK OFFICE, ASSIGNMENT DIVISION, BOX ASSIGNMENTS, CG-4, 1213 JEFFERSON DAVIS HWY, SUITE 320, WASHINGTON, D.C. 20231.

RECORDATION DATE: 10/26/1998

REEL/FRAME: 9550/0261
NUMBER OF PAGES: 3

BRIEF: ASSIGNMENT OF ASSIGNOR'S INTEREST (SEE DOCUMENT FOR DETAILS).

ASSIGNOR:
BILL, DAVID

DOC DATE: 09/25/1998

ASSIGNEE:
SPINNER NETWORKS, INC.
1209 HOWARD AVENUE, SUITE 200
BURLINGAME, CALIFORNIA 94040

SERIAL NUMBER: 09105840
PATENT NUMBER:

FILING DATE: 06/26/1998
ISSUE DATE:

TARA WASHINGTON, EXAMINER
ASSIGNMENT DIVISION
OFFICE OF PUBLIC RECORDS

ASSIGNMENT

WHEREAS I, David Bill, a citizen of the United States of America, residing at 700 Vega Circle, Foster City, California 94404, have invented a "Distributing Personalized Content" for which we have executed application papers for a U.S. patent thereon, which was filed on June 26, 1998, Serial No. 09/105840; and

WHEREAS, Spinner Networks, Inc., a California corporation, having a place of business at 1209 Howard Avenue, Suite 200, Burlingame, California 94010, is desirous of acquiring the exclusive right, title and interest in and to said invention and in and to the Letters Patent to be granted and issued therefor in the United States of America and its territories and possessions, and in all countries foreign thereto;

NOW, THEREFORE, for a valuable consideration, the receipt of which is hereby acknowledged, I, David Bill, do sell, assign, transfer and set over unto the said Spinner Networks, Inc., its successors and assigns, the full and exclusive right, title and interest in and to said invention, and in and to any and all letters patent to be granted and issued therefor, not only for, to and in the United States of America, its territories and possessions, but also for, to and in all other countries including all priority rights under the International Convention; and we hereby authorize and request the Commissioner of Patents and Trademarks to issue said Letters Patent to said Spinner Networks, Inc., its successors and assigns, in accordance with this Assignment.

WITNESS OUR HAND at _____, this 25th day of September, 1998.

David Bill

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Mateo)

On this 25 day of September, 1998, before me, William Neumann, Notary Public, a Notary Public, personally appeared David Bill and personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

WILLIAM NEUMANN
COMM. #1150752
NOTARY PUBLIC - CALIFORNIA
SAN MATEO COUNTY
My Comm. Expires OCT 28, 2001

NOTARY PUBLIC

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

MARCH 02, 1999

PTAS

THE LAW OFFICES OF STEVEN A. SWERNOFSKY
STEVEN A. SWERNOFSKY
P.O. BOX 390013
MOUNTAIN VIEW, CA 94040

UNITED STATES PATENT AND TRADEMARK OFFICE
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RECORDATION DATE: 11/03/1998

REEL/FRAME: 9574/0482
NUMBER OF PAGES: 5

BRIEF: CHANGE OF NAME (SEE DOCUMENT FOR DETAILS).

ASSIGNOR:
TERRAFLEX DATA SYSTEMS
INCORPORATED

DOC DATE: 06/24/1998

ASSIGNEE:
SPINNER NETWORKS, INC.
1209 HOWARD AVENUE
SUITE 200
BURLINGAME, CALIFORNIA 94010

SERIAL NUMBER: 09105840
PATENT NUMBER:

FILING DATE: 06/26/1998
ISSUE DATE:

PEARLENE FOSTER, PARALEGAL
ASSIGNMENT DIVISION
OFFICE OF PUBLIC RECORDS

I 510525

ENDORSED - FILED
in the office of the Secretary of State
of the State of California
JUN 26 1998
BILL JONES, Secretary of State

CERTIFICATE OF AMENDMENT OF AMENDED AND RESTATED ARTICLES OF INCORPORATION OF TERRAFLEX DATA SYSTEMS INCORPORATED

The undersigned, Josh Felser and David Samuel, hereby certify that:

ONE: They are the duly elected and acting President and Secretary, respectively, of Terraflex Data Systems Incorporated, a California corporation.

TWO: Article I of the Restated Articles of Incorporation of this corporation is hereby amended to read as follows:

"ARTICLE 1

The name of this corporation is Spinner Networks Incorporated."

THREE: Section A of Article III of the Amended and Restated Articles of Incorporation of this corporation is hereby amended to read as follows:

"A. Classes of Stock. This corporation is authorized to issue two classes of stock, to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares that this corporation is authorized to issue is Fourteen Million Five Hundred Fifty Thousand (14,550,000) shares. Ten Million Three Hundred Fifty Thousand (10,350,000) shares shall be Common Stock and Four Million Two Hundred Thousand (4,200,000) shares shall be Preferred Stock, 500,000 of which are designated Series A Preferred Stock, 1,200,000 of which are designated Series B Preferred Stock and 2,500,000 of which are designated Series C Preferred Stock."

FOUR: The foregoing amendments of Amended and Restated Articles of Incorporation have been duly approved by the Board of Directors.

FIVE: The foregoing amendments of Amended and Restated Articles of Incorporation has been duly approved by the required vote of shareholders in accordance with Sections 902 and 903 of the California General Corporation Law; the total number of outstanding shares of each class entitled to vote with respect to the foregoing amendment was 2,150,787 shares of Common Stock, 365,208 shares of Series A Preferred Stock, 1,076,389 shares of Series B Preferred Stock and 1,029,410 shares of Series C Preferred Stock. The number of shares voting in favor of the foregoing amendment equaled or exceeded the vote required, such required vote being a majority of the outstanding shares of Common Stock and a majority of the outstanding shares of Preferred Stock.

IN WITNESS WHEREOF, the undersigned have executed this Certificate of Amendment on June 24, 1998.

Josh Felser, President

David Samuel, Secretary

The undersigned certify under penalty of perjury that they have read the foregoing Certificate of Amendment and know the contents thereof, and that the statements therein are true.

Executed at Burlingame, California, on June 24, 1998.

Josh Felser

David Samuel

OFFICE OF THE SECRETARY OF STATE

AGREEMENT AND PLAN OF REORGANIZATION

AMONG

AMERICA ONLINE, INC.

ADAMS ACQUISITION SUB, INC.

SPINNER NETWORKS INCORPORATED

THE SHAREHOLDERS OF
SPINNER NETWORKS INCORPORATED
IDENTIFIED ON SCHEDULE I HERETO

THE FOUNDERS OF
SPINNER NETWORKS INCORPORATED

Dated as of May 28, 1999

TABLE OF CONTENTS

SCHEDULES

Schedule I	Stockholders Names, Addresses and Number of Shares of Company Common Stock held by such Stockholder
Schedule 2.3(d)	Warrants
Schedule 3.1(a)	Foreign Qualifications
Schedule 3.1(c)	Capitalization
Schedule 3.1(g)(iii)	Changes in Liabilities; Material Transactions
Schedule 3.1(g)(vii)	Changes in Capitalization
Schedule 3.1(h)	Taxes
Schedule 3.1(i)	Encumbrances
Schedule 3.1(j)	Leases
Schedule 3.1(k)(v)	Form of Company Confidentiality Agreement
Schedule 3.1(k)(ix)	Intellectual Property
Schedule 3.1(k)(xi)	Licenses
Schedule 3.1(l)(i)	Software
Schedule 3.1(m)	Agreements Not in the Ordinary Course
Schedule 3.1(o)	Litigation
Schedule 3.1(q)	Accounts and Notes Payable
Schedule 3.1 (r)	Governmental Authorizations and Consents
Schedule 3.1(t)	Employees and Consultants
Schedule 3.1(u)	Employee Benefit Plans
Schedule 3.1(w)	Insurance
Schedule 3.1(x)	Bank Accounts; Powers of Attorney
Schedule 3.1(gg)	Affiliates
Schedule 3.2(c)	Operating Permits; Authorizations; Consents
Schedule 3.2(d)	Non-Accredited Investors
Schedule 6.2(p)	Key Employees
Schedule 4.1(g)	Persons Subject to Shareholder Agreements
Schedule 6.2(p)	Key Employees

EXHIBITS

Exhibit A	Form of Agreement of Merger
Exhibit B	Form of Indemnity Escrow Agreement
Exhibit C	Form of Company Affiliate Pooling Agreement
Exhibit D	Form of Employee Confidentiality Agreement
Exhibit E	Form of Non-Competition Agreement
Exhibit F	Form of Registration Rights Agreement
Exhibit G	Form of Release Agreement
Exhibit H	Form of Shareholder Agreement
Exhibit I	Form of Shareholder Investment Representation Letter and Agreement
Exhibit J	Form of Termination Agreement

AGREEMENT AND PLAN OF REORGANIZATION dated as of May 28, 1999, among **America Online, Inc.**, a Delaware corporation ("Parent"), **Adams Acquisition Sub, Inc.**, a Delaware corporation and wholly-owned subsidiary of Parent ("Acquisition Sub"), **Spinner Networks Incorporated**, a California corporation (the "Company"), the shareholders of the Company identified on Schedule I attached hereto (collectively, the "Stockholders") and the Founders (as such term is defined herein).

WHEREAS, the Boards of Directors of each of Parent, Acquisition Sub and the Company have determined that it is in the best interests of the stockholders of Parent and Acquisition Sub and shareholders (hereinafter, the "stockholders") of the Company for Parent to acquire the Company upon the terms and subject to the conditions set forth herein;

WHEREAS, in furtherance of such acquisition, the Boards of Directors of each of Parent, Acquisition Sub and the Company have duly approved and adopted this Agreement and Plan of Reorganization (this "Agreement"), the Agreement of Merger in substantially the form of Exhibit A attached hereto (the "Agreement of Merger") and the proposed merger of Acquisition Sub with and into the Company in accordance with this Agreement, the Agreement of Merger, the Delaware General Corporation Law (the "Delaware Statute") and the California General Corporation Law (the "California Statute"), whereby, among other things, the issued and outstanding shares of (i) Common Stock, no par value, of the Company (the "Company Common Stock"), (ii) Series A Preferred Stock, no par value, of the Company (the "Series A Preferred Stock"), (iii) Series B Preferred Stock, no par value, of the Company (the "Series B Preferred Stock"), (iv) Series C Preferred Stock, no par value, of the Company (the "Series C Preferred Stock") and (v) Series D Preferred Stock, no par value, of the Company (the "Series D Preferred Stock," and together with the Company Common Stock, the Series A Preferred Stock, the Series B Preferred Stock and the Series C Preferred Stock, the "Company Stock") (other than shares held by Dissenting Stockholders (as defined herein)), will be exchanged and converted into shares of common stock, $.01 par value, of Parent (the "Parent Common Stock") and the corresponding Parent Rights in the manner set forth in Article II hereof and in the Agreement of Merger, upon the terms and subject to the conditions set forth in this Agreement and the Agreement of Merger;

WHEREAS, as a condition to the willingness of, and as an inducement to, Parent and Acquisition Sub to enter into this Agreement, contemporaneously with the execution and delivery of this Agreement, the Company, certain stockholders of the Company and certain other parties are entering into the Related Agreements (other than the Indemnity Escrow Agreement (which is not being executed or delivered until the Closing));

WHEREAS, for federal income tax purposes, it is intended that the Merger shall qualify as a tax-free reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code");

WHEREAS, after consummation of the Merger and in accordance with the terms and provisions of this Agreement, Parent intends that the Surviving Corporation will merge with and into Parent; and

WHEREAS, for accounting purposes, it is intended that the Merger shall qualify for "pooling-of-interests" treatment.

NOW, THEREFORE, in consideration of the mutual benefits to be derived from this Agreement and the Agreement of Merger and the representations, warranties, covenants, agreements, conditions and promises contained herein and therein, the parties hereby agree as follows:

ARTICLE I

GENERAL

1.1 **The Merger.** In accordance with the provisions of this Agreement, the Agreement of Merger, the Delaware Statute and the California Statute, Acquisition Sub shall be merged with and into the Company (the "Merger"), which at and after the Effective Time shall be, and is sometimes herein referred to as, the "Surviving Corporation." Acquisition Sub and the Company are sometimes referred to as the "Constituent Corporations."

1.2 **The Effective Time of the Merger.** Subject to the provisions of this Agreement, the Agreement of Merger shall be executed and verified by each of the Constituent Corporations and delivered to and filed with (i) the Secretary of State of the State of Delaware in the manner provided under Section 252 of the Delaware Statute and (ii) the Secretary of State of the State of California in the manner provided in the California Statute. The Merger shall become effective (the "Effective Time") (i) upon the filing of the Agreement of Merger with the Secretary of State of the State of California or (ii) at such time thereafter as is provided in the Agreement of Merger.

1.3 **Effect of Merger.** At the Effective Time the separate existence of Acquisition Sub shall cease and Acquisition Sub shall be merged with and into the Surviving Corporation, and the Surviving Corporation shall succeed, without other transfer, to all rights and property of each of the Constituent Corporations and shall be subject to all the debts and liabilities of the Constituent Corporations in the same manner as if the Surviving Corporation had itself incurred them, and be subject to all the restrictions, disabilities and duties of each of the Constituent Corporations as provided in (i) Section 259 of the Delaware Statute and (ii) the California Statute.

1.4 **Charter and By-Laws of Surviving Corporation.** From and after the Effective Time, (i) the Charter of the Company shall be amended so that Article III of the Company's Articles of Incorporation shall read in its entirety as follows: "The total number of shares of all classes of stock which the corporation shall have authority to issue is 100, all of which shall consist of common stock, no par value," and so amended, shall be the Charter of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, (ii) the by-laws of the Company shall be the by-laws of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, the Charter or such by-

laws, (iii) the directors of Acquisition Sub shall be the directors of the Surviving Corporation, unless and until removed, or until their respective terms of office shall have expired, in accordance with the California Statute, the Charter and the by-laws of the Surviving Corporation, as applicable and (iv) the officers of the Acquisition Sub shall be the officers of the Surviving Corporation, unless and until removed, or until their terms of office shall have expired, in accordance with the California Statute, the Charter and the by-laws of the Surviving Corporation, as applicable.

1.5 Taking of Necessary Action. Prior to the Effective Time, the parties hereto shall do or cause to be done all such acts and things as may be necessary or appropriate in order to effectuate the Merger as expeditiously as reasonably practicable, in accordance with this Agreement, the Agreement of Merger, the Delaware Statute and the California Statute.

1.6 Tax-Free Reorganization; Pooling of Interests.

(a) For Federal income tax purposes, the parties intend that the Merger be treated as a tax-free reorganization within the meaning of Section 368(a) of the Code. Except for cash paid in lieu of fractional shares, no consideration that could constitute "other property" within the meaning of Section 356 of the Code is being transferred by Parent for the Company Stock in the Merger. The parties shall not take a position on any tax return or take any action inconsistent with this Section 1.6 unless otherwise required by a taxing authority.

(b) None of the parties shall take any action or fail to take any action that would prevent the Merger from qualifying as a reorganization within the meaning of Section 368(a) of the Code or a pooling of interests under Accounting Principles Board Opinion No. 16, either before or after the consummation of the Merger, and each of the Company and Parent shall use all reasonable efforts to prevent any of its respective stockholders, officers or directors from taking or failing to take any such action.

1.7 Closing. Unless this Agreement shall have been terminated and the transactions contemplated by this Agreement abandoned pursuant to the provisions of Article IX, and subject to the provisions of Article VI, the closing of the Merger (the "Closing") will take place at 10:00 a.m. (Eastern time) on a date (the "Closing Date") to be mutually agreed upon by the parties, which date shall be not later than the third Business Day after all the conditions set forth in Article VI shall have been satisfied (or waived in accordance with Section 10.9, to the extent the same may be waived), unless another date is agreed to in writing by the parties. The Closing shall take place at the offices of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., One Financial Center, Boston, Massachusetts, unless another place is agreed to in writing by the parties. As used herein, the term "Business Day" shall mean any day other than a Saturday, Sunday or day on which banks are permitted to close in the City and State of New York.

ARTICLE II

EFFECT OF THE MERGER ON THE CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS; EXCHANGE OF CERTIFICATES

2.1 **Total Consideration; Effect on Capital Stock.** The entire consideration (the "Aggregate Consideration") payable by Parent with respect to all outstanding shares of capital stock of the Company (the "Outstanding Shares") and for all options (whether vested or unvested), warrants, rights, calls, commitments or agreements of any character to which the Company is a party or by which it is bound calling for the issuance of shares of capital stock of the Company or any securities convertible into or exercisable or exchangeable for, or representing the right to purchase or otherwise receive, directly or indirectly, any such capital stock, or other arrangement to acquire, at any time or under any circumstance, capital stock of the Company or any such other securities (the "Convertible Securities"; and the Outstanding Shares and the Convertible Securities being sometimes herein collectively referred to as the "Fully Diluted Company Shares") shall be an aggregate of the number of shares of Parent Common Stock (subject to adjustment as hereinafter provided in this Section 2.1) (the "Total Parent Share Amount") as is obtained by dividing (A) $320,000,000 less the Net Company Expenses by (B) the average closing price of a share of Parent Common Stock on the New York Stock Exchange as reported in the Wall Street Journal for the five (5) most recent trading days ending on the second trading day immediately preceding the Closing Date (the "Stipulated Price").

For purposes of the calculation of the exchange ratio for Company Stock under Section 2.1(c) hereof, it is assumed that the number of Fully Diluted Company Shares is 12,622,894, which number shall be confirmed or updated at the Closing and reflected in the certificate of the Chief Executive Officer of the Company that is being provided to Parent and Acquisition Sub pursuant to Section 6.2(a) (the "Fully Diluted Company Share Amount"). At the Effective Time, subject and pursuant to the terms and conditions of this Agreement and the Agreement of Merger, by virtue of the Merger and without any action on the part of the Constituent Corporations or the holders of the capital stock of the Constituent Corporations:

(a) **Capital Stock of Acquisition Sub.** Each issued and outstanding share of common stock, $.01 par value per share, of Acquisition Sub shall be converted into one share of common stock, $.01 par value per share, of the Surviving Corporation.

(b) **Cancellation of Certain Shares of Company Stock.** Each share of Company Stock that is (A) owned by the Company as treasury stock, (B) authorized but unissued, (C) owned by any subsidiary of the Company or (D) owned by Parent or directly or indirectly by any wholly owned subsidiary of Parent, shall be canceled and no Parent Common Stock or other consideration shall be delivered in exchange therefor. As used herein, "subsidiary" means any corporation, partnership, joint venture, limited liability company or other legal entity of which the Company, the Surviving Corporation, Parent or such other person, as the case may be, (either alone or through or together with any other subsidiary) owns, directly or indirectly, more than 50% of the stock or other equity interests the holders of which are generally entitled to vote for

the election of the board of directors or other governing body of such corporate or other legal entity.

(c) **Conversion and Exchange Ratio for Company Stock.** Subject to Section 2.2, each share of Company Stock issued and outstanding at the Effective Time (other than shares canceled pursuant to Section 2.1(b) and shares held by Dissenting Stockholders, if any), including all accrued and unpaid dividends thereon, shall be exchanged and converted automatically into the right to receive a fraction (the "Exchange Ratio") of a share of Parent Common Stock, determined by dividing (i) the Total Parent Share Amount by (ii) the Fully Diluted Company Share Amount. The number of securities to be issued to each stockholder of the Company under this Section 2.1 shall be calculated by aggregating all shares of Company Stock held by each such stockholder, so that such number of securities to be issued shall be equal to the number of shares of Company Stock held by such stockholder multiplied by the Exchange Ratio, with cash paid in lieu of any fractional share of Parent Common Stock pursuant to Section 2.2(e) hereof. As of the Effective Time, all shares of Company Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares shall cease to have any rights with respect thereto, except the right to receive Parent Common Stock and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefore upon surrender of such certificate in accordance with Section 2.2 hereof.

All calculations pursuant to this Agreement shall be rounded to the nearest one-billionth (.000000001). Each share of Parent Common Stock to be issued upon conversion of shares of Company Stock in accordance with this Section 2.1 shall include the corresponding percentage of a right (the "Parent Rights") to purchase shares of Series A-1 Junior Participating Preferred Stock, $.01 par value, of Parent pursuant to the Rights Agreement dated as of May 12, 1998, as amended (the "Parent Rights Agreement"), between Parent and Bank Boston, N.A., as Rights Agent, a true and correct copy of which has been provided by Parent to the Company. Prior to the Distribution Date (as defined in the Parent Rights Agreement), all references in this Agreement to the Merger Shares shall be deemed to include the Parent Rights. The shares of Parent Common Stock to be issued upon the exchange and conversion of Company Stock in accordance with this Section 2.1(c) shall sometimes be hereinafter collectively referred to as the "Merger Shares." Subject to Section 2.2 with respect to Merger Shares, the Merger Shares subject to the rights of repurchase described in Section 2.3(f) shall be placed in escrow with the Parent and shall be distributed in accordance with such stockholder's stock purchase agreement or stock option agreement with the Parent.

(d) **Shares of Dissenting Stockholders.**

(i) If provided for under the California Statute, notwithstanding any other provision of this Agreement to the contrary, shares of Company Stock that are outstanding immediately prior to the Effective Time and which are held by stockholders (each, a "Dissenting Stockholder") who shall not have voted in favor of the Merger or consented thereto in writing and who shall have demanded properly in writing appraisal for such shares in accordance with the California Statute and who shall not have

withdrawn such demand or otherwise have forfeited appraisal rights (collectively, the "Dissenting Shares") shall not be converted into or represent the right to receive Parent Common Stock. Such stockholders shall be entitled to receive payment of the appraised value of such shares of Company Stock held by them in accordance with the provisions of the California Statute, except that all Dissenting Shares held by stockholders who shall have failed to perfect or who effectively shall have withdrawn or lost their rights to appraisal of such shares of Company Stock under the California Statute shall thereupon be deemed to have been converted into and to have become exchangeable, as of the Effective Time, for the right to receive, without any interest thereon, the Parent Common Stock, upon surrender, in the manner provided in Section 2.2(d), of the Company Certificate or Company Certificates that formerly evidenced such shares of Company Stock.

(ii) Company shall give Parent (A) prompt notice of any demands for appraisal received by Company, withdrawals of such demands, and any other instruments served pursuant to the California Statute and received by Company and (B) the opportunity to direct all negotiations and proceedings with respect to demands for appraisal under the California Statute. Company shall not, except with the prior written consent of Parent, make any payment with respect to any demands for appraisal, or offer to settle, or settle, any such demands.

(e) **Adjustments for Capital Changes.** If, prior to the Effective Time, Parent or the Company recapitalizes through a subdivision of its outstanding shares into a greater number of shares, or a combination of its outstanding shares into a lesser number of shares, or reorganizes, reclassifies or otherwise changes its outstanding shares into the same or a different number of shares or other classes, or declares a dividend on its outstanding shares payable in shares of its capital stock or securities convertible into shares of its capital stock, then the Exchange Ratio will be adjusted appropriately so as to maintain the relative proportionate interests of the holders of shares of Company Stock and the holders of shares of Parent Common Stock.

2.2 **Escrow Deposit; Exchange of Certificates.**

(a) **Exchange Agent.** Prior to the Effective Time, Parent shall designate a bank or trust company to act as exchange agent (together with any other agent or agents which Parent may appoint, the "Exchange Agent") in the Merger.

(b) **Indemnity Escrow Agreement.** Reference is made to the escrow agreement to be dated as of the Effective Time among the Stockholders' Committee (as defined herein), Parent and a mutually agreeable escrow agent (the "Indemnity Escrow Agent") in the form of Exhibit B hereto (the "Indemnity Escrow Agreement"), pursuant to which, among other things the stockholders of the Company, in accordance with the terms of this Agreement, shall secure the indemnification obligations of the Indemnifying Persons pursuant to Article VIII hereof.

(c) **Delivery of Common Stock By Parent.** As soon as practicable after the Effective Time, Parent shall make available to the Exchange Agent for exchange in accordance

with this Section 2.2 (i) ninety percent (90%) of the Merger Shares issuable to each stockholder of the Company pursuant to Section 2.1 in exchange for outstanding shares of Company Stock ("Exchange Agent Shares") and (ii) cash for fractional shares associated with the Exchange Agent Shares in amounts calculated according to Section 2.2(f) below. As soon as practicable after the Effective Time, Parent shall cause to be distributed to the Indemnity Escrow Agent (i) ten percent (10%) of the Merger Shares issuable to each stockholder of the Company pursuant to Section 2.1 in exchange for outstanding shares of Company Stock (collectively, the "Indemnity Escrow Shares") and (ii) cash for fractional shares associated with the Indemnity Escrow Shares in amounts calculated according to Section 2.2(f) below. The stockholders of the Company, by their execution and delivery of the Shareholder Investment Representation Letter and Agreement and their execution and delivery of this Agreement and/or their approval of the Merger, hereby authorize and direct Parent to make such deposit of the Indemnity Escrow Shares in the name of the Indemnity Escrow Agent on their behalf. All calculations to determine the number of Merger Shares to be delivered to the Exchange Agent and Indemnity Escrow Agent as aforesaid shall be rounded to the nearest whole share.

(d) **Procedure for Exchange.** Upon receipt by the Exchange Agent at or after the Effective Time from a stockholder of the Company of (i) a surrendered certificate or certificates which immediately prior to the Effective Time represented issued and outstanding shares of Company Stock (each, a "Company Certificate"), (ii) an executed letter of transmittal, in which, among other things, such holder agrees to be bound by Section 7.2(b) and any other applicable restrictions on transfer of the Merger Shares represented by such Parent Certificate(s), including restrictions relating to the Indemnity Escrow Agreement, (iii) three (3) stock powers duly executed in blank and (iv) such other documents as may be reasonably required by Parent or the Exchange Agent; such stockholder shall be entitled to receive in exchange therefor a certificate or certificates (each a "Parent Certificate") representing the number of Merger Shares (less the Indemnity Escrow Shares attributable to such stockholder) representing that number of Merger Shares that such holder has the right to receive pursuant to Section 2.1 with respect to such Company Certificate upon its cancellation, together with any associated cash for fractional shares (less 10% of such cash attributable to the Indemnity Escrow Shares, which shall be deposited with the Indemnity Escrow Agent). All Indemnity Escrow Shares shall be held by, and distributed in accordance with, the terms and provisions of the Indemnity Escrow Agreement.

(e) **Transfers of Ownership.** In the event of a transfer of ownership of shares of Company Stock that is not registered on the transfer records of the Company, Parent Certificates representing the proper number of Merger Shares may be issued (subject to all escrow requirements contained in this Agreement) to a transferee if the Company Certificate representing such Company Stock is presented to the Exchange Agent, accompanied by all documents required to evidence and effect such transfer and by evidence that any applicable stock or other transfer taxes have been paid. Until surrendered as contemplated by this Section 2.2, each Company Certificate shall be deemed, on and after the Effective Time, to represent only the right to receive upon such surrender, Parent Certificates representing Merger Shares (subject to all escrow requirements contained in this Agreement) as contemplated by Section 2.1(c), without interest.

(f) **Fractional Shares.** No fractional shares of Parent Common Stock shall be issued in connection with the Merger, but in lieu thereof each holder of Company Stock who would otherwise be entitled to receive a fraction of a share of Parent Common Stock will receive from Parent, at such time as such holder has the right to receive a certificate representing Merger Shares as contemplated by Section 2.2(d) (but for the escrow requirements of Section 2.2(b) hereof), an amount of cash (without interest), rounded to the nearest cent, equal to (i) the Stipulated Price multiplied by (ii) the fraction of a share of Parent Common Stock otherwise issuable to such holder. The fractional interests of each stockholder of the Company will be aggregated so that no stockholder of the Company will receive cash in an amount equal or greater than the Stipulated Price.

(g) **No Further Ownership Rights in Company Stock.** All Merger Shares issued upon the surrender for exchange of shares of Company Stock in accordance with the terms of this Article II shall be deemed to have been issued in full satisfaction of all rights pertaining to such shares of Company Stock. If, after the Effective Time, any Company Certificate is presented to the Surviving Corporation, such Company Certificate shall be canceled and exchanged as provided in this Article II.

(h) **No Liability.** Neither Parent, Acquisition Sub nor the Company shall be liable to any holder of shares of Company Stock or Parent Common Stock, as the case may be, for Merger Shares (or dividends or distributions with respect thereto) to be issued in exchange for Company Stock pursuant to this Section 2.2, if, on or after the expiration of six months following the Effective Time, such shares are delivered to a public official pursuant to any applicable abandoned property, escheat or similar law.

(i) **Lost, Stolen or Destroyed Company Certificates.** In the event any Company Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit to that effect by the person claiming such Company Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such person of a bond in such amount as Parent may reasonably direct as indemnity against any claim that may be made against it with respect to such Company Certificate, Parent will issue in exchange for such lost, stolen or destroyed Company Certificate the Merger Shares and cash in lieu of fractional shares deliverable in respect thereof pursuant to this Agreement.

2.3 Conversion of the Company Employee Options; Other Securities.

(a) Subject to Sections 2.3(f) and 2.1(c) of this Agreement, at the Effective Time, each of the Company's then outstanding employee and consultant stock options (collectively the "Company Options") which have not been terminated, exercised or otherwise converted as of the Effective Time (including the incentive stock options and non-qualified stock options under the 1997 Stock Plan (the "Company Stock Plan") to purchase Company Common Stock, by virtue of the Merger and without any further action on the part of any holder thereof, shall be assumed by Parent and substituted for an option to purchase a number of shares of Parent Common Stock determined by multiplying the number of shares of Company Common Stock covered by such Company Option immediately prior to the Effective Time by the Exchange Ratio (rounded down

to the nearest whole number of shares), at an exercise price per share of Parent Common Stock equal to the exercise price in effect under such Company Option immediately prior to the Effective Time divided by the Exchange Ratio (rounded up to the nearest cent), which option to purchase Parent Common Stock shall contain the same term, status as an "incentive stock option" under Section 422 of the Code (if such Company Option was theretofore a Company incentive stock option), vesting schedule and otherwise be on substantially the same terms and conditions as set forth in the assumed Company Option (any such assumed Company Option being herein referred to as an "Assumed Option"). The parties intend that the assumption and conversion of Company Options under this Section 2.3 shall meet the requirements of Section 424(a) of the Code and this Section 2.3 shall be interpreted in a manner consistent with such interpretation

(b) The Company shall promptly take all actions necessary to ensure that following the Effective Time no holder of any Company Options or rights pursuant to, nor any participant in, the Company Stock Plan or any other plan, program or arrangement providing for the issuance or grant of any interest in respect of the capital stock of the Company and any subsidiary of the Company will have any right thereunder to acquire equity securities, or any right to payment in respect of the equity securities, of the Company, any such subsidiary or the Surviving Corporation.

(c) Parent shall take all corporate action necessary to reserve for issuance a sufficient number of shares of Parent Common Stock for delivery upon exercise of the Assumed Options in accordance with this Section 2.3. As promptly as practicable following the Effective Time, but in no event later than 20 business days thereafter, Parent shall (i) file a registration statement on Form S-8 (or any successor or other appropriate form) with respect to the shares of Parent Common Stock subject to the Assumed Options and (ii) shall use reasonable efforts to maintain the effectiveness of such registration statement for so long as the Assumed Options remain outstanding or otherwise register such shares of Parent Common Stock for issuance.

(d) Prior to the Effective Time, all then issued and outstanding warrants to acquire shares of Company Common Stock or securities convertible into Common Stock (collectively, the "Company Warrants") shall be exercised in full. All of the Company Warrants issued and outstanding as of the date of this Agreement are listed on Schedule 2.3(d) attached hereto. The Company shall promptly take all actions necessary to ensure that following the Effective Time no holder of a Company Warrant will have any right thereunder to acquire equity securities, or any right to payment in respect of the equity securities, of the Company, any subsidiary of the Company or the Surviving Corporation. Each holder of a Company Warrant shall on or prior to the Effective Time execute and deliver a consent in form and substance acceptable to Parent pursuant to which said holder shall acknowledge and agree that his, her or its Company Warrant shall be exercised in full or terminated prior to the Effective Time.

(e) Except as set forth in Section 2.3(a), all outstanding shares of preferred stock or other securities of the Company that are convertible, directly or indirectly, into shares of Company Common Stock shall be converted into such Company Common Stock in accordance with the respective terms thereof effective immediately prior to the Closing and shall be included in the calculation of Fully Diluted Company Shares.

(f) Pursuant to this Section 2.3(f), the Company hereby assigns to Parent, effective immediately after the Effective Time, all "rights of repurchase" (as described in the stock purchase agreements and stock option agreements under the Company Stock Plan), with respect to all shares purchased under the Company Stock Plan or issued or issuable upon exercise of stock options granted to optionees under the Company Stock Plan, so that no shares of any type or nature shall vest, and no rights of repurchase shall lapse, as a result of the transactions contemplated hereby.

2.4 **Authorization of the Merger, this Agreement, the Agreement of Merger, the Indemnity Escrow Agreement, the Indemnity Escrow Agent and the Stockholders' Committee.** In the event the Merger shall be approved by the stockholders of the Company, as required by the Delaware Statute and the California Statute and as contemplated by this Agreement, such approval shall constitute approval and ratification by the stockholders of the Company of the (i) Merger, as required by the Delaware Statute and the California Statute, (ii) provisions of this Agreement and the Agreement of Merger, (iii) designation of the Indemnity Escrow Agent and the approval and ratification by the stockholders of the Company of the terms and provisions of the Indemnity Escrow Agreement and (iv) designation of the Stockholders' Committee.

ARTICLE III

REPRESENTATIONS AND WARRANTIES

3.1 **Representations and Warranties of the Company.** The Company represents and warrants to Parent and Acquisition Sub that, except as disclosed in the disclosure schedule dated the date hereof, certified by the Chief Executive Officer of the Company and delivered by the Company to Parent and Acquisition Sub simultaneously herewith (which disclosure schedule shall contain references to the representations and warranties to which the disclosures contained therein relate and an item on such disclosure schedule shall be deemed to qualify only the particular subsection or subsections specified for such item unless an appropriate cross reference is made to another section) (the "Company Disclosure Schedule"):

(a) **Organization; Good Standing; Qualification and Power.** The Company (i) is a corporation duly organized, validly existing and in good standing under the laws of the State of California, (ii) has all requisite corporate power and authority to own, lease and operate its properties and assets and to carry on its business as now being conducted, and as proposed to be conducted, to enter into this Agreement, the Agreement of Merger and the Related Agreements (as defined below) to which the Company is a party, to perform its obligations hereunder and thereunder, and to consummate the transactions contemplated hereby and thereby and (iii) is duly qualified and in good standing to do business in those jurisdictions listed in Section 3.1(a) of the Company Disclosure Schedule and in all other jurisdictions where the failure to be so qualified and in good standing would have a material adverse effect on the Company or its business, properties, condition (financial or otherwise), assets, Liabilities, operations, results of operations, prospects (as disclosed to Parent by the Company) or affairs (a "Company Material Adverse

Effect"). The Company has delivered to Parent true and complete copies of the Charter and by-laws of the Company, in each case as amended to the date hereof. As used herein, "Charter" shall mean, with respect to any corporation, those instruments that at the time constitute its corporate charter as filed or recorded under the general corporation law of the jurisdiction of its incorporation, including the articles or certificate of incorporation or organization, and any amendments thereto, as the same may have been restated, and any amendments thereto (including any articles or certificates of merger or consolidation, certificate of correction or certificates of designation or similar instruments which effect any such amendment) which became effective after the most recent such restatement.

(b) Subsidiaries; Equity Investments. The Company has never had, nor does it currently have, any subsidiaries, nor has it ever owned, nor does it currently own, any capital stock or other proprietary interest, directly or indirectly, in any corporation, association, trust, partnership, joint venture or other entity. Except for the Company Options and the Company Warrants, there are no options, warrants, rights, calls, commitments or agreements of any character to which the Company is a party or by which it is bound calling for the issuance of shares of capital stock of the Company or any securities convertible into or exercisable or exchangeable for, or representing the right to purchase or otherwise receive, any such capital stock, or other arrangement to acquire, at any time or under any circumstance, capital stock of the Company or any such other securities.

(c) Capital Stock; Securities. (i) The authorized capital stock of the Company consists of (A) 15,600,000 shares of Company Common Stock, of which 3,613,317 shares are issued and outstanding, (B) 500,000 shares of Series A Preferred Stock, of which 365,208 shares are issued and outstanding and (C) 1,200,000 shares of Series B Preferred Stock, of which 1,076,389 shares are issued and outstanding, (D) 2,700,000 shares of Series C Preferred Stock, of which 2,671,040 shares are issued and outstanding, and (E) 4,000,000 shares of Series D Preferred Stock, of which 3,832,673 shares are issued and outstanding (the shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock are, collectively, the "Company Preferred Stock"). The Company has reserved 2,650,000 shares of Company Common Stock for issuance upon the exercise of Company Options, of which 1,011,722 are issued and outstanding. Each share of Company Preferred Stock is convertible into Company Common Stock on a one share for one share basis. All outstanding shares of Company Stock are duly authorized, validly issued and outstanding, fully paid and non-assessable and not subject to preemptive rights created by statute, the Charter or by-laws of the Company or any agreement to which the Company is a party or by which it is bound. Section 3.1(c) of the Company Disclosure Schedule sets forth a true and complete list of the holders of record shares of Company Stock, their addresses, and the number of such shares owned of record and beneficially by each such holder. Schedule 3.1(c) of the Company Disclosure Schedule sets forth a true and complete list of the Company Options, outstanding as of the date hereof, including the name and address of record of each holder thereof, whether the initial grantee was an employee or consultant to the Company at the time of the grant of such Company Option, a description of services rendered by each consultant in connection with such Company Option, the class and number of shares of Company Common Stock subject to each such Company Option, the per share exercise price for each such Company Option, whether such Company

Option is a Company incentive stock option or a Company non-qualified stock option, the grant date of each such Company Option, the employee stock plan pursuant to which such Company Option was granted, if any, and the vesting schedule and vesting acceleration provisions, if any, applicable thereto. Schedule 3.1(c) of the Company Disclosure Schedule sets forth a true and complete list of Company Warrants, including the name and address of each holder thereof, the class and number of shares of capital stock subject to each Company Warrant and the exercise price for each such Company Warrant. All outstanding shares of Company Common Stock, Company Preferred Stock and outstanding Company Options and Company Warrants were issued in compliance with applicable federal and state securities laws. The holders of the Company Stock, Company Options and Company Warrants have been or will be properly given, or shall have properly waived, any required notice prior to the Merger, and all such rights will be terminated at or prior to the Effective Time.

(ii) Except as set forth in this Section 3.1(c), there are no equity securities of any class or series of the Company, or any security exchangeable into or exercisable for such equity securities, issued, reserved for issuance or outstanding. Except as set forth in this Section 3.1(c), there are no options, warrants, equity securities, calls, rights, commitments, convertible debt instruments, transfer restrictions or agreements, instruments or understandings (whether written or oral, formal or informal) of any character to which the Company is a party or by which it is bound obligating the Company to issue, deliver or sell, or cause to be issued, delivered or sold, additional shares of capital stock of the Company or obligating the Company to grant, extend, accelerate the vesting of or enter into any such option, warrant, equity security, call, right, commitment, instrument, restriction, understanding or agreement. Except as provided in this Agreement or any transaction contemplated thereby, there are no voting trusts, proxies or other agreements or understandings with respect to the voting, transfer or disposition of the shares of capital stock of the Company.

(iii) All Company Options have been issued in accordance with the terms of the Company option plans and pursuant to the standard forms of option agreement previously provided to Parent or its representatives. No option will by its terms require any adjustment in connection with the Merger. Neither the consummation of transactions contemplated by this Agreement or the Related Agreements (as defined in Section 4.1)) nor any action taken by the Company in connection with such transactions will result in (A) any acceleration of vesting in favor of any optionee under any Company Option; (B) any additional benefits for any optionee under any Company Option; or (C) the inability of Parent after the Effective Time to exercise any right or benefit held by the Company prior to the Effective Time with respect to any Company Option assumed by Parent, including, without limitation, the right to repurchase an optionee's unvested shares on termination of such optionee's employment. The assumption by Parent of Company Options in accordance with Section 2.3 hereunder will not (A) give the optionees additional benefits which they did not have under their options prior to such assumption (after taking into account the existing provisions of the options, such as their respective exercise prices and vesting schedules) and (B) constitute a breach of the Company plans or any agreement entered into pursuant to such plan.

(iv) Except as set forth on Section 3.1(c)(iv) of the Company Disclosure Schedule, no shares purchased under the Company Stock Plan or issued or issuable upon exercise of options granted under the Company Stock Plan are subject to rights of repurchase as described in the stock purchase agreements and stock option agreements under the Company Stock Plan. If any such rights of repurchase exist as to any outstanding shares of capital stock of the Company, Section 3.1(c)(iv) sets forth the name of the holder of the shares subject to repurchase, the date of purchase or issuance upon option exercise, the amount of shares, the certificate numbers of the share certificates held in escrow, any repurchase rights that lapse as a result of the Merger, the legends on each certificate representing Shares subject to repurchase rights, the lapsing schedule of the repurchase rights. If any such rights of repurchase exist as to shares underlying Company Options, Section 3.1(c)(iv) sets forth the name of the optionee, the grant date of the option, the amount of shares subject to the option, the exercise price of the option, any repurchase rights that lapse as a result of the Merger and the lapsing schedule of the repurchase rights.

(d) Authority; No Consents. The execution, delivery and performance by the Company of this Agreement, the Agreement of Merger and the Related Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Company; and this Agreement and the Related Agreements to which it is a party and which are delivered herewith have been, and the Agreement of Merger and all other Related Agreements to which it is a party when executed and delivered by the Company will be, duly and validly executed and delivered by the Company, and this Agreement and the Related Agreements to which it is a party are the valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms, and the Agreement of Merger when executed and delivered by the Company will be enforceable against the Company in accordance with its terms. Neither the execution, delivery and performance of this Agreement, the Related Agreements to which it is a party or the Agreement of Merger nor the consummation by the Company of the transactions contemplated hereby or thereby nor compliance by the Company with any provision hereof or thereof will in any material respect (A) conflict with, (B) result in any violations of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, cancellation or acceleration of any benefit or obligation contained in or the loss of any material benefit under or (E) result in the creation of any Encumbrance on or against any assets, rights or property of the Company under any term, condition or provision of (x) any instrument or agreement to which the Company is a party, or by which the Company or any of its properties, assets or rights may be bound, (y) any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to the Company or any of its properties, assets or rights or (z) the Company's Charter or by-laws. Except as set forth in Section 3.1(d) of the Company Disclosure Schedule, no permit, authorization, registration, license, consent or approval of or by, or any notification of or filing with, any Governmental Authority or other person is required in connection with the execution, delivery and performance by the Company of this Agreement, the Agreement of Merger or the Related Agreements or the consummation by the Company of the

transactions contemplated hereby or thereby, except for (i) the distribution of the Stockholders' Materials with respect to the adoption and approval by the stockholders of this Agreement, the Merger and the transactions contemplated hereby, (ii) the filing of the Agreement of Merger with the Secretary of State of the State of Delaware and the Secretary of State of the State of California and appropriate documents with the relevant authorities of other states in which the Company is qualified to do business and (iii) such other consents, waivers, authorizations, filings, approvals and registrations which if not obtained or made would not have a Company Material Adverse Effect or materially impair the ability of the Company and the stockholders to consummate the transactions contemplated by this Agreement or the Agreement of Merger, including, without limitation, the Merger.

(e) **Financial Information.** (i) The Company has previously delivered to Parent the following financial statements (collectively, the "Company Financial Statements"):

(A) the unaudited balance sheet of the Company as at March 31, 1999 (the "Company Interim Balance Sheet") and the related statements of operations, cash flow and shareholders' equity for the 3-month period then ended, prepared by the Company (the "Company Interim Financial Statements");

(2) the audited balance sheet of the Company as at December 31, 1998 (the "Company Audited Balance Sheet"; and the date thereof being the "Company Audited Balance Sheet Date"), and the related audited statements of operations, cash flow and shareholders' equity for the year then ended (including the footnotes thereto), together with the report thereon of PricewaterhouseCoopers LLP, the Company's independent public accountants (the "Company Accountants"); and

(3) the audited balance sheet of the Company as at December 31, 1997, and the related audited statements of operations, cash flow and shareholders' equity for the year then ended (including the footnotes thereto), together with the report thereon of the Company's Accountants.

(ii) The Company Financial Statements (A) are in accordance with the books and records of the Company, (B) fairly present the financial condition of the Company as at the respective dates indicated and the results of operations of the Company for the respective periods indicated and (C) have been prepared in accordance with generally accepted accounting principles consistently applied ("GAAP"), except as indicated therein and, in the case of the Company Interim Financial Statements, for the absence of complete footnote disclosure as required by GAAP and subject, in the case of the Company Interim Financial Statements, to changes resulting from normal year-end audit adjustments, which adjustments shall not in any event result in a material adverse change to any item of revenue or expense.

(f) **Absence of Undisclosed Liabilities.** At the Company Audited Balance Sheet Date, with respect to the Company Audited Balance Sheet, at March 31, 1999, with respect to the Company Interim Balance Sheet, and at May 28, 1999 with respect to the interim balance sheet

delivered on that date (the "May Balance Sheet") respectively, the Company had no liability or obligation of any nature (whether known or unknown, matured or unmatured, fixed or contingent, secured or unsecured, accrued, absolute or otherwise (a "Liability")) required to be set forth on the Company Audited Balance Sheet, the Company Interim Balance Sheet or the May Balance Sheet, respectively, in order for the Audited Company Balance Sheet, the Company Interim Balance Sheet or the May Balance Sheet, respectively, to fairly present the financial condition of the Company at the respective dates thereof in accordance with GAAP, which was not provided for or disclosed thereon, and all liability reserves established by the Company and set forth thereon were adequate for all such Liabilities at the respective dates thereof. There were no material loss contingencies (as such term is used in Statement of Financial Accounting Standards No. 5 issued by the Financial Accounting Standards Board in March, 1975 ("FAS No. 5")) which were not adequately provided for on the Company Audited Balance Sheet, the Company Interim Balance Sheet or the May Balance Sheet, respectively, as required by FAS No. 5.

(g) **Absence of Changes.** Since the Company Audited Balance Sheet Date, the Company has been operated in the ordinary course, consistent with past practice, and there has not been:

(i) any Company Material Adverse Effect;

(ii) any damage, destruction or loss, whether or not covered by insurance, having or which could have a Company Material Adverse Effect;

(iii) except as set forth on Schedule 3.1(g)(iii), any Liability created, assumed, guaranteed or incurred, or any material transaction, contract or commitment entered into, by the Company, other than the license, sale or transfer of the Company's products to customers in the ordinary course of business;

(iv) any payment, discharge or satisfaction of any material Encumbrance or Liability by the Company or any cancellation by the Company of any material debts or claims or any amendment, termination or waiver of any rights of material value to the Company;

(v) any declaration, setting aside or payment of any dividend or other distribution of any assets of any kind whatsoever with respect to any shares of the capital stock of the Company, or any direct or indirect redemption, purchase or other acquisition of any such shares of the capital stock of the Company;

(vi) any stock split, reverse stock split, combination, reclassification or recapitalization of any Company Stock, or any issuance of any other security in respect of or in exchange for, any shares of Company Stock;

(vii) except as set forth on Schedule 3.1(g)(vii), any issuance by the Company of any shares of its capital stock or any debt security or securities, rights, options or

warrants convertible into or exercisable or exchangeable for any shares of its capital stock or debt security (other than Company Options or shares of Company Common Stock issued upon exercise of Company Options in accordance with the present terms thereof);

(viii) any license, sale, transfer, pledge, mortgage or other disposition of any material tangible or intangible asset (including any Intellectual Property Rights) of the Company, other than in the ordinary course of business;

(ix) any termination of, or written indication of an intention to terminate or not renew, any material contract, license, commitment or other agreement between the Company and any other person;

(x) any material write-down or write-up of the value of any asset of the Company, or any material write-off of any accounts receivable or notes receivable of the Company or any portion thereof;

(xi) any increase in or modification of compensation payable or to become payable to (A) any director or officer of the Company or (B) any employee of the Company other than in the ordinary course of business, or the entering into of any employment contract with any officer or employee;

(xii) any increase in or modification or acceleration of any benefits payable or to become payable under any bonus, pension, severance, insurance or other benefit plan, payment or arrangement (including, but not limited to, the granting of stock options, restricted stock awards or stock appreciation rights) made to, for or with any director, officer, employee, consultant or agent of the Company;

(xiii) any loan, advance or capital contribution to or investment in any person or the engagement in any transaction with any employee, officer, director or securityholder of the Company, other than advances to employees in the ordinary course of business for travel and similar business expenses;

(xiv) any change in the accounting methods or practices followed by the Company or any change in depreciation or amortization policies or rates theretofore adopted;

(xv) any change in the manner in which the Company extends discounts or credit to customers or otherwise deals with customers;

(xvi) any termination of employment of any officer or key employee of the Company or any expression of intention by any officer or key employee of the Company to resign from such office or employment with the Company;

(xvii) any amendments or changes in the Company's Charter or by-laws

(xviii) any labor dispute or any union organizing campaign;

(xix) the commencement of any litigation or other action by or against the Company; or

(xx) any agreement, understanding, authorization or proposal, whether in writing or otherwise, for the Company to take any of the actions specified in items (i) through (xix) above.

(h) Tax Matters. Except to the extent of any reserves reflected in the Company Audited Balance Sheet or the Company Interim Balance Sheet, the Company and each other corporation (if any) included in any consolidated or combined tax return in which the Company has been included (i) have filed and will file, in a timely and proper manner, consistent with applicable laws, all Federal, state and local Tax returns and Tax reports required to be filed by them through the Closing Date (the "Company Returns") with the appropriate governmental agencies in all jurisdictions in which Company Returns are required to be filed and have timely paid or will timely pay all amounts shown thereon to be due; (ii) have paid and shall timely pay all Taxes of the Company (or such other corporation) required to have been paid by the Company (or such other corporation) on or before the Closing Date; and (iii) currently are not the beneficiary of an extension of time within which to file any Tax return or Tax report. All such Company Returns were and will be correct and complete at the time of filing. All Taxes of the Company attributable to all taxable periods ending on or before the Closing Date, to the extent not required to have been previously paid, have been adequately provided for on the Company Audited Balance Sheet and the Company Interim Balance Sheet (as appropriate) to the extent required by GAAP and the Company will not accrue a Tax Liability from the date of the Company Audited Balance Sheet up to and including the Closing Date, other than a Tax Liability accrued in the ordinary course of business. The Company has not been notified by the Internal Revenue Service or any state, local or foreign taxing authority that any issues have been raised (and are currently pending) in connection with any Company Return, and no waivers of statutes of limitations have been given with respect to the Company that are still in effect. Except as contested in good faith and disclosed in Section 3.1(h) of the Company Disclosure Schedule, any deficiencies asserted or assessments (including interest and penalties) made as a result of any examination by the Internal Revenue Service or by any other taxing authorities of any Company Return have been fully paid or are adequately provided for on the Company Audited Balance Sheet and the Company Interim Balance Sheet (as appropriate) to the extent required by GAAP and the Company has received no notification that any proposed additional Taxes have been asserted. The Company (i) has not made an election to be treated as a "consenting corporation" under Section 341(f) of the Code and (ii) is not a "personal holding company" within the meaning of Section 542 of the Code and (iii) has not been a United States real property holding corporation within the meaning of Section 897(c) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code. The Company has not agreed to, nor is it required to, make any adjustment under Section 481(a) of the Code by reason of a change in accounting method or otherwise. The Company will not incur a Tax Liability resulting from the Company ceasing to be a member of a consolidated or combined group that had previously filed consolidated, combined or unitary Tax returns. Each granted option that was designated as an

"incentive stock option" on the applicable books and records of the Company qualified as an "incentive stock option" within the meaning of the Section 422 of the Code on the date in which such option was granted.

As used in this Agreement, "Tax" means any of the Taxes and "Taxes" means, with respect to any entity, (A) all income taxes (including any tax on or based upon net income, gross income, income as specially defined, earnings, profits or selected items of income, earnings or profits) and all gross receipts, sales, use, ad valorem, transfer, franchise, license, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property or windfall profits taxes, alternative or add-on minimum taxes, customs duties and other taxes, fees, assessments or charges of any kind whatsoever, together with all interest and penalties, additions to tax and other additional amounts imposed by any taxing authority (domestic or foreign) on such entity and (B) any liability for the payment of any amount of the type described in the immediately preceding clause (A) as a result of being a "transferee" (within the meaning of Section 6901 of the Code or any other applicable law) of another entity or a member of an affiliated or combined group.

(i) Title to Assets, Properties and Rights and Related Matters. The Company has good and valid title to all assets, properties and interests in properties, real, personal or mixed, reflected, respectively, on the Company Audited Balance Sheet and/or the Company Interim Balance Sheet or acquired after the Company Audited Balance Sheet Date (except (A) inventory or other property sold or otherwise disposed of since the Company Audited Balance Sheet Date, or the date of the Company Interim Balance Sheet, as the case may be, in the ordinary course of business and (B) accounts receivable and notes receivable paid in full subsequent to the Company Audited Balance Sheet Date, or the date of the Company Interim Balance Sheet, as the case may be), or not so reflected therein but used or useful in the conduct or operation of the Company's business, free and clear of all Encumbrances, of any kind or character, except for (i) those Encumbrances set forth in Section 3.1(i) of the Company Disclosure Schedule, (ii) liens for current taxes not yet due and payable and (iii) statutory mechanics and materialmen's liens. The assets, properties and interests in properties of the Company are in good operating condition and repair in all material respects (ordinary wear and tear excepted). The assets, properties and interests in properties of the Company to be owned, leased or licensed by the Surviving Corporation at the Effective Time shall include all assets, properties and interests in properties (real, personal and mixed, tangible and intangible) and all rights, leases, licenses and other agreements necessary to enable the Surviving Corporation to carry on the business of the Company as presently conducted by the Company or as proposed to be conducted. As used herein, the term "Encumbrances" shall mean and include security interests, mortgages, liens, pledges, guarantees, charges, easements, reservations, restrictions, clouds, equities, rights of way, options, rights of first refusal and all other encumbrances, whether or not relating to the extension of credit or the borrowing of money.

(j) Real Property-Owned or Leased. The Company does not currently own, nor has it or any of its predecessors ever owned, any real property. Section 3.1(j) of the Company Disclosure Schedule contains a list and brief description of (i) all real property leased by the Company, together with all buildings and other structures and material improvements located on

such real property (the "Leased Real Property"), and (ii) with respect to each lease covering the Leased Real Property (collectively, the "Leases"), (A) the name of the lessor, (B) any requirement of consent of the lessor to assignment (including assignment by way of merger or change of control) and (C) the termination date of the Lease, (D) notice requirements with respect to termination, (E) the annual rental thereunder, and (F) any renewal or purchase terms thereof. The Company is the owner and holder of all the leasehold estates purported to be granted by each Lease, and all Leases are in full force and effect and constitute valid and binding obligations of the Company. The Company has made available to Parent true and complete copies of all Leases. Except as set forth in Section 3.1(j) of the Company Disclosure Schedule, all improvements included in the Leased Real Property are in good operating condition and repair in all material respects (ordinary wear and tear excepted) and there does not exist any condition which interferes with the economic value or use of such property and improvements.

(k) Intellectual Property.

(i) The Company owns or has sufficient rights, to all Intellectual Property Rights necessary or required for the conduct of its business as the Company currently conducts its business and as the Company has disclosed to Parent that it proposes to conduct its business (collectively, the "Company Rights");

(ii) The execution, delivery and performance of this Agreement and the Related Agreements and the consummation of the Merger and the consummation of the other transactions contemplated hereby, will not breach, violate or conflict with any instrument or agreement governing any Company Rights, will not cause the forfeiture or termination or give rise to a right of forfeiture or termination of any Company Right or in any way impair the right of the Company or the Surviving Corporation to use, license (or sublicense), or dispose of, or to bring any action for the infringement of, any Company Right or portion thereof;

(iii) There are no royalties, honoraria, fees or other payments payable in excess of an aggregate of $20,000 by the Company to any person by reason of the transfer, license or exercise of the Company Rights, other than sales commissions paid in the ordinary course of business;

(iv) Neither the manufacture, marketing, licensing (or sublicensing), sale, transmission, delivery (electronically or otherwise), or use of any product or service which the Company currently or proposes (as disclosed by the Company to Parent) to license, sell, market, transmit, broadcast, deliver (electronically or otherwise) or use, or which the Company is currently developing, violates any license (or sublicense) or agreement of the Company with any third party or infringes any common law or statutory rights of any other party, including, without limitation, rights relating to defamation, contractual rights, Intellectual Property Rights (other than patent infringement which shall be to the knowledge of the Company or the Stockholders) and rights of privacy or publicity; nor, to the knowledge of the Company, is any third party infringing upon, or violating any license (or sublicense), transmission, broadcast, delivery, (electronically or

otherwise) or agreement with the Company relating to, any Company Right; and there is no pending or, to the knowledge of the Company, threatened claim or litigation contesting the validity, ownership or exercise of any Company Right, nor, to the knowledge of the Company, is there any basis for any such claim nor has the Company received any notice asserting that any Company Right or the exercise of any Company Right conflicts or will conflict with the rights of any other party, nor, to the knowledge of the Company, is there any basis for any such assertion;

(v) All current and past officers, employees and consultants of or to the Company have executed and delivered to and in favor of the Company an agreement regarding the protection of confidential and proprietary information and the assignment to the Company of all Intellectual Property Rights arising from the services performed for the Company by such persons (collectively, the "Confidentiality Agreements", the form of which is attached to Section 3.1(k)(v) of the Company Disclosure Schedule). The Company has taken and will continue through the Effective Time to take all steps necessary, appropriate or desirable to safeguard and maintain the secrecy and confidentiality of, and its proprietary rights in, all Company Rights;

(vi) All works that were created or prepared by consultants, independent contractors or other third parties for or on behalf of Company (including any materials and elements created or prepared by such parties in connection therewith) (A) are and shall constitute "works made for hire" specially ordered or commissioned by the Company within the meaning of United States' copyright law, or (B) all right, title and interest therein (including any materials and elements created or prepared by such parties in connection therewith) have been assigned to the Company;

(vii) No licenses or rights have been granted by the Company, or, to the knowledge of the Company, by any employee, consultant, officer, director, agent or affiliate of the Company or by any other party, to distribute the source code of, or to use source code to create Derivative Works, of, any product commercially available from or under development by the Company for which the Company possesses the source code. As used herein, "Derivative Work" shall mean a work that is based upon one or more preexisting works, such as a revision, enhancement, modification, abridgment, condensation, expansion or any other form in which such preexisting works may be recast, transformed or adapted, and which, if prepared without authorization of the owner of the copyright in such preexisting work, would constitute a copyright infringement. For purposes herein, a "Derivative Work" shall also include any compilation that incorporates such a preexisting work as well as translations from one type of code to another;

(viii) No person has any marketing rights to any of the Intellectual Property Rights of the Company (excluding Third Party Technology);

(ix) Section 3.1(k)(ix) of the Company Disclosure Schedule sets forth, for the Intellectual Property Rights owned by the Company, a complete and accurate list of all United States and foreign (a) Patents; (b) Trademarks (including Internet domain

registrations and unregistered Trademarks); and (c) Copyrights indicating for each, the applicable jurisdiction, registration number (or application number), and date issued (or date filed);

(x) All registered Trademarks, issued Patents and registered Copyrights are currently in compliance with all legal requirements (including the timely post-registration filing of affidavits of use and incontestability and renewal applications with respect to Trademarks, and the payment of filing, examination and maintenance fees and proof of working or use with respect to Patents. No Trademark listed in Section 3.1(k)(ix) to the Company Disclosure Schedule has been or is now involved in any opposition or cancellation and, to the knowledge of the Company, no such action is threatened with respect to any of the Trademarks. No Patent listed in Section 3.1(k)(ix) to the Company Disclosure Schedule has been or is now involved in any interference, reissue, re-examination or opposing proceeding;

(xi) Section 3.1(k)(xi) of the Company Disclosure Schedule sets forth a complete and accurate list of all license agreements granting any right to use or practice any rights under any Intellectual Property Rights, whether the Company is the licensee or licensor thereunder and any assignments, consents, forbearances to sue, judgments, Orders, settlements or similar obligations relating to any Intellectual Property to which the Company is a party or otherwise bound (collectively, the "License Agreements"), indicating for each the title, the parties, date executed, whether or not it is exclusive. The License Agreements are valid and binding obligations of Company, and there exists no event or condition which will result in a violation or breach of, or constitute (with or without due notice or lapse of time or both) a default by the Company under any such License Agreement;

(xii) All Trademarks of the Company have been in continuous use by the Company. To the knowledge of the Company, there has been no prior use of such Trademarks by any third party which would confer upon said third party superior rights in such Trademarks; the Company has reasonably policed the Trademarks against third party infringement; and the registered Trademarks have been continuously used in the form appearing in, and in connection with the goods and services listed in, their respective registration certificates or identified in their respective pending applications; and

(xiii) As used herein, the term "Intellectual Property Rights" shall mean all intellectual property rights worldwide, including, without limitation, trademarks, service marks, trade names, service names, URLs and Internet domain names and applications therefor (and all interest therein), designs, slogans and general intangibles of like nature, together with all goodwill related to the foregoing (including any registrations and applications for any of the foregoing) (collectively, "Trademarks"); patents (including any including any utility models, design patents, divisionals, reissues, continuations, continuations-in-part, re-examinations, extensions, renewals and applications for any of the foregoing) (collectively, "Patents"); copyrights (including any registrations,

applications and renewals for any of the foregoing (collectively, "Copyrights"); computer programs and other computer software (including, but not limited to the Software); databases; technology, trade secrets and other confidential information, know-how, proprietary technology, processes, formulae, algorithms, models, user interfaces, customer lists, inventions, source codes and object codes and methodologies, architecture, structure, display screens, layouts, development tools, instructions, templates, marketing materials, inventions, trade dress, logos and designs and all documentation and media constituting, describing or relating to the foregoing (collectively, "Trade Secrets"). As used herein, "Third Party Technology" means all Intellectual Property Rights owned or held by any third party.

(l) Company Software.

(i) Section 3.1(l)(i) of the Company Disclosure Schedule sets forth a true and complete list and description of all software programs, systems and applications (A) designed or developed or under development by employees of the Company or by consultants on the Company's behalf (the "Owned Software") or (B) licensed by the Company from any third party or constituting "off-the-shelf" software (the "Licensed Software") but excluding those items of "off the shelf" software which are Licensed Software but which are not embedded in any product or service offered or presently contemplated to be offered by the Company and which have a per copy purchase price of less than $2,500 per copy, in each case that is manufactured or used by the Company in the operation of its business or licensed or sold by the Company to third parties (collectively, the "Software") and, in the case of Licensed Software, Section 3.1(l)(i) of the Company Disclosure Schedule identifies each license agreement with respect thereto;

(ii) All of the Owned Software are original works of authorship. The Company owns all right, title and interest in and to the Owned Software, and all copyrights thereto, free and clear of any Encumbrance and has not sold, assigned, licensed, distributed or in any other way disposed of or subjected the Owned Software to any Encumbrance. Except as set forth in the license agreements listed in Section 3.1(l)(i) of the Company Disclosure Schedule, none of the Owned Software incorporates, is based on or is a derivative work of any third party code that is subject to the terms of a public source license or otherwise imposes conditions on the terms and conditions under which the Owned Software may be used or distributed;

(iii) The Licensed Software is validly held and used by the Company and may be used by the Company pursuant to the applicable license agreement with respect thereto without the consent of or notice to any third party and is fully and freely utilizable by the Surviving Corporation or Parent without the consent of or notice to any third party. All of the Company's computer hardware has validly licensed software installed therein and the Company's use thereof does not conflict with or violate any such license;

(iv) The Software is free from any significant software defect, is free from any programming, documentation error or virus ("Bugs") not consistent with commercially

reasonable industry standards acceptable for such Bugs, operates and runs in a reasonable and efficient business manner, conforms to the specifications thereof (consistent with commercially reasonable industry standards), and, the applications can be compiled from their associated source code;

(v) The Company has not altered its data, or any Software or supporting software that may in turn damage the integrity of the data, whether stored in electronic, optical or magnetic or other form; and

(vi) The Company's products, services, hardware, databases, firmware, embedded control systems, Owned Software and Licensed Software (including existing products Software and technology and Software and technology currently under development) used in the operation of the business as presently conducted and as proposed to be conducted have been designed, written and tested to, and will at all times (i) record, store, process, calculate, manage, manipulate and present calendar dates falling before, on and after (and if applicable, spans of time including) December 31, 1999, including, without limitation, single-century formulas and multi-century formulas and (ii) create, calculate, accept, display, store, accent, compare, sort, manipulate, or process any information dependent on or relating to such dates or otherwise provide use of dates or date-dependent or date-related data, including, but not limited to, century recognition, day-of-the week recognition, leap years, date values and interfaces of date functionalities, without loss of accuracy, functionality, data integrity and performance and will provide that all date-related data and user interface functionalities and data fields include the indication of century (collectively, "Year 2000 Compliant"). With respect to hardware, firmware, embedded control systems and Licensed Software which constitutes "off the shelf" software and which is not embedded in any product or service offered or presently contemplated to be offered by the Company, the representation and warranty contained in this Section 3.1(vi) is given to the knowledge of the Company, which, in this context shall mean the actual knowledge of the Company as well as what the Company would reasonably be expected to know after undertaking a comprehensive Year 2000 compliance audit.

(m) Agreements, Etc. Section 3.1(m) of the Company Disclosure Schedule sets forth a true and complete list of all written or oral contracts, agreements and other instruments not made in the ordinary course of business to which the Company is a party, or made in the ordinary course of business and referred to in clauses (i) through (xviii) of this Section 3.1(m). The Company is not a party to any agreement, arrangement or understanding, whether written or oral, formal or informal, relating to:

(i) agreements for the development, modification or enhancement of computer software or multimedia products,

(ii) any material distributorship, dealer, sales, advertising, agency, manufacturer's representative, franchise or similar contract or relationship or any other contract relating to the payment of a commission or other fee calculated as or by

reference to a percentage of the profits or revenues of the Company or of any business segment of the Company;

(iii) any joint venture, partnership or other agreement or arrangement for the sharing of profits;

(iv) any collective bargaining contract or other contract with or commitment to any labor union;

(v) the future purchase, sale or license of products, material, supplies, equipment or services requiring payments to or from the Company in an amount in excess of $10,000 per annum, which agreement, arrangement or understanding is not terminable on 30 days' notice without cost or other liability at or at any time after the Effective Time, or in which the Company has granted or received manufacturing rights, most favored nations pricing provisions or exclusive marketing or other rights relating to any product, group of products, services, technology, assets or territory;

(vi) any license (whether as licensor or licensee), or sublicense, royalty, permit, or franchise agreement, including, without limitation, any agreement pursuant to which the Company licenses any Company Rights to any third party (other than ordinary course licenses to end-users);

(vii) the content or delivery of its computer software or multimedia products and services (including the transmission or other performance (electronically or otherwise));

(viii) the employment of any officer, employee, consultant or agent or any other type of contract, commitment or understanding with any officer, employee, consultant or agent which (except as otherwise generally provided by applicable law) is not immediately terminable without cost or other liability at or at any time after the Effective Time;

(ix) profit-sharing, bonus, stock option, stock appreciation right, pension, retirement, disability, stock purchase, hospitalization, insurance or similar plan or agreement, formal or informal, providing benefits to any current or former director, officer, employee, agent or consultant;

(x) indenture, mortgage, promissory note, loan agreement, guarantee or other agreement or commitment for the borrowing of money, for a line of credit or for a leasing transaction of a type required to be capitalized in accordance with Statement of Financial Accounting Standards No. 13 of the Financial Accounting Standards Board;

(xi) any agreement, instrument or other arrangement granting or permitting any Encumbrance on any of the properties, assets or rights of the Company;

(xii) any lease for real property (whether as lessor or lessee) or any other lease or agreement under which the Company is lessee of or holds or operates any items of tangible personal property owned by any third party;

(xiii) contract or commitment for charitable contributions;

(xiv) contract or commitment for capital expenditures individually or in the aggregate in excess of $20,000;

(xv) any agreement or contract with a "disqualified individual" (as defined in Section 280G(c) of the Code), which could result in an "excess parachute payment" (as defined in Section 280G(b)(1) of the Code) being made under Section 280G of the Code as a result of the transactions contemplated hereby;

(xvi) agreement or arrangement for the sale of any assets, properties or rights having a value in excess of $20,000;

(xvii) agreement which restricts the Company from engaging in any aspect of its business or competing in any line of business in any geographic area;

(xviii) any agreements with owners or representatives of owners of music related rights, including without limitation, music licensing organizations such as RIAA, ASCAP and BMI; or

(xviii) any other agreement, contract or commitment which is material to the Company.

For purposes of this Section 3.1(m), the term "material" shall mean and refer to those agreements, contracts, instruments or arrangements (as applicable) that involve payments or expenditures by or to the Company, or otherwise have an aggregate value, of at least $20,000. The Company has furnished to Parent true and complete copies of all such agreements listed in Section 3.1(m) of the Company Disclosure Schedule and (x) each such agreement (A) is the legal, valid and binding obligation of the Company and, to the knowledge of the Company, the legal, valid and binding obligation of each other party thereto, in each case enforceable in accordance with its terms, (B) is in full force and effect and (y) to the knowledge of the Company, except as set forth in Section 3.1(m) of the Company Disclosure Schedule, the other party or parties thereto is or are not in material default thereunder.

(n) **No Defaults.** The Company has in all material respects performed all the obligations required to be performed by it to date and is not in default or alleged to be in default under (i) its Charter or by-laws or (ii) any material agreement, lease, license, contract, commitment, instrument or obligation to which the Company is a party or by which any of its properties, assets or rights are or may be bound or affected, and with respect to (i) above, there exists no event, condition or occurrence, and with respect to (ii) above, to its knowledge there

exists no event, condition or occurrence, which, with or without due notice or lapse of time, or both, would constitute such a default or alleged default by it of any of the foregoing.

(o) Litigation, Etc. Except as set forth in Section 3.1(o) of the Company Disclosure Schedule, there are no (i) actions, suits, claims, investigations or legal or administrative or arbitration proceedings (collectively, "Actions") pending, or to its knowledge, threatened against the Company nor, to its knowledge, is there any basis therefor, whether at law or in equity, or before or by any Federal, state, municipal, foreign or other governmental court, department, commission, board, bureau, agency or instrumentality ("Governmental Authority"), (ii) judgments, decrees, injunctions or orders of any Governmental Authority or arbitrator against the Company or (iii) disputes with customers or vendors. There are no Actions pending or to its knowledge, threatened, nor, to its knowledge, is there any basis therefor, with respect to (A) the current employment by, or association with, the Company, or future employment by, or association with, Parent or the Surviving Corporation, of any of the present officers or employees of or consultants to the Company (collectively, the "Designated Persons") or (B) the use, in connection with any business presently conducted or proposed to be conducted by the Company of any information, techniques or processes presently utilized or proposed to be utilized by the Company, Parent, the Surviving Corporation or any of the Designated Persons, that the Company, Parent, the Surviving Corporation or any of the Designated Persons are or would be prohibited from using as the result of a violation or breach of, or conflict with any agreements or arrangements between any Designated Person and any other person, or any legal considerations applicable to unfair competition, trade secrets or confidential or proprietary information. The Company has delivered to Parent all material documents and correspondence relating to such matters referred to in Section 3.1(o) of the Company Disclosure Schedule (including, in the case of clause (iii) of the first sentence of this Section 3.1(o), any correspondence evidencing material customer dissatisfaction with the Company or its products or services).

(p) Accounts and Notes Receivable. All the accounts receivable and notes receivable owing to the Company as of the date hereof constitute, and as of the Effective Time will constitute, valid and enforceable claims arising from bona fide transactions in the ordinary course of business, and there are no known or asserted claims, refusals to pay or other rights of set-off against any thereof. There is (i) no account debtor or note debtor delinquent in its payment by more than 30 days, (ii) no account debtor or note debtor that has refused (or, to the knowledge of the Company, threatened to refuse) to pay its obligations for any reason, (iii) to the knowledge of the Company, no account debtor or note debtor that is insolvent or bankrupt and (iv) no account receivable or note receivable which is pledged to any third party by the Company. Except to the extent of a reserve which the Company has established specifically for doubtful accounts receivable and notes receivable (which reserve is set forth on the Company Year-End Balance Sheet and Company Interim Balance Sheet, is reasonable under the circumstances and is consistent with past practice), each account receivable of the Company existing on the Closing Date shall be paid in full by not later than the sixtieth (60th) day after the date each such respective account receivable was created and all of the notes receivable shall be paid in accordance with the terms thereof, in each case assuming commercially reasonable collection practices.

(q) **Accounts and Notes Payable.** Except as set forth in Section 3.1(q) of the Company Disclosure Schedule, all accounts payable and notes payable by the Company to third parties as of the date hereof arose, and as of the Closing will have arisen, in the ordinary course of business, and, except as set forth in Section 3.1(q) of the Company Disclosure Schedule, there is no such account payable or note payable delinquent in its payment, except those contested in good faith and already disclosed in Section 3.1(q) of the Company Disclosure Schedule.

(r) **Compliance; Governmental Authorizations and Consents.**

(i) The Company has complied and is presently in compliance in all material respects with all Federal, state, local or foreign laws, ordinances, regulations and orders applicable to it or its business (including, without limitation, laws, ordinances, regulations and orders applicable to labor, employment and employment practices, terms and conditions of employment and wages and hours). The Company has all Federal, state, local and foreign governmental licenses, consents, approvals, authorizations, permits, orders, decrees and other compliance agreements necessary in the conduct of its business as presently conducted or as proposed to be conducted, such licenses, consents, approvals, authorizations, permits, orders, decrees and other compliance agreements are in full force and effect, no violations are or have been recorded in respect of any thereof and no proceeding is pending or, to the knowledge of the Company, threatened to revoke or limit any thereof. Section 3.1(r) of the Company Disclosure Schedule contains a true and complete list of all such governmental licenses, authorizations, consents, approvals, permits, orders, decrees and other compliance agreements under which the Company is operating or bound, the Company is not in default or alleged to be in default under any thereof and the Company has furnished to Parent true and complete copies thereof. None of such licenses, consents, approvals, authorizations, permits, orders, decrees and other compliance agreements shall be affected in any material respect by the Merger or the transactions contemplated hereby.

(ii) The Company is the "ultimate parent entity" of the "acquired person" (as such terms are defined in 16 C.F.R. Section 801.1 and 802.2, respectively) in connection with the transactions contemplated by this Agreement, the Agreement of Merger and the Related Agreements, and the "annual net sales" and "total assets," in each case determined in accordance with 16 C.F.R. 801.11 of such "acquired person," are in each case, less than $10,000,000. Accordingly, no filing by the Company with the Federal Trade Commission and the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, is required in connection with this Agreement or the Merger.

(s) **Environmental Matters.** The Company currently is and at all times has been in material compliance with all Federal, state and local laws, ordinances, regulations and orders relating to the protection of the environment applicable to its properties, facilities or operations.

(t) **Labor Relations; Employees.**

(i) The Company employs a total of 61 employees as of the date hereof. Section 3.1(t) of the Company Disclosure Schedule identifies all employees and consultants employed or engaged by the Company and any of its subsidiaries and sets forth each such individual's rate of pay or annual compensation, job title and date of hire, including all active employees and those absent from work due to illness, disability or otherwise and expected to return to active status. Except as set forth on Section 3.1(t) of the of the Company Disclosure Schedule, there are no employment, consulting, severance pay, continuation pay, termination or indemnification agreement or other similar agreements of any nature (whether in writing or not) between the Company or any subsidiary and any current or former shareholder, officer, director, employee, or any consultant. No such employment agreement disclosed on Section 3.1(t) of the Company Disclosure Schedule will, as a direct or indirect result of the transaction contemplated herein either require any payment by the Company or any subsidiary or any consent or waiver from any shareholder, officer, director, employee or consultant; or result in any change in the nature of any rights or any shareholder, officer, director, employee or consultant, including, but not limited to, any accelerated payments, deemed satisfaction of goals or conditions, new or increased benefits or additional or accelerated vesting. Except as required under Code Section 411(d)(3), no individual will accrue or receive additional benefits, service or accelerated rights to payments under any Employee Plan (as defined in Section 3.1(u)), including the right to receive any parachute payment, as defined in Section 280G of the Code, or become entitled to severance, termination allowance or similar payments as a result of the transaction contemplated herein that could result in the payment or any such benefits or payments. Except as set forth in Section 3.1(t) of the Company Disclosure Schedule, (A) the Company is not delinquent in payments to any of its employees for any wages, salaries, commissions, bonuses or other direct compensation for any services performed by them to date or amounts required to be reimbursed to such employees, (B) upon termination of the employment of any such employees, neither the Company, any subsidiary, Parent, Acquisition Sub nor the Surviving Corporation will by reason of anything done prior to the Closing be liable to any of such employees for so-called "severance pay" or any other payments, (C) there is no unfair labor practice complaint against the Company pending before the National Labor Relations Board or any comparable Governmental Authority, and none of the Company's or any subsidiary's employment policies or practices is currently being audited or investigated by any federal, state or local government agency, (D) there is no labor strike, dispute, claim, charge, lawsuit, proceeding, labor slowdown or stoppage pending or threatened against or involving the Company, or any subsidiary, (E) no labor union has taken any action with respect to organizing the employees of the Company, or any subsidiary, (F) neither any grievance nor any arbitration proceeding arising out of or under collective bargaining agreements is pending and no claim therefor has been asserted against the Company, or any subsidiary, and (G) no employee has informed any officer of the Company that such employee will terminate his or her employment or engagement with the Company, any subsidiary, or the Surviving Corporation and the Company has no reason to believe that the Key Employees that accept employment with the Surviving Corporation will not remain employees of the Surviving Corporation for at least 180 days after the Closing. To the Company's knowledge, neither the Company nor

any employee of the Company or any subsidiary is in violation of any term of any employment contract, patent disclosure agreement or any other contract or agreement relating to the relationship of such employee with the Company (or any subsidiary) or any other party because of the nature of the business conducted or proposed to be conducted by the Company (or any subsidiary) or the execution and delivery of the Confidentiality Agreement by such employee. All individuals who are independent contractors are reasonably classified as not employees or common law employees for tax, benefits, wage, labor or any other legal purposes.

(ii) The Company or any subsidiary has entered into Confidentiality Agreements with all current and former officers, employees and consultants of the Company or any subsidiary with access to or knowledge of Company Rights in the forms attached to Schedule 3.1(t) of the Company Disclosure Schedule.

(u) **Employee Benefit Plans and Contracts.**

(i) Section 3.1 (u) of the Company Disclosure Schedule identifies all "employee benefit plans" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and all bonus, phantom stock, stock appreciation rights, incentive, deferred compensation, retirement or supplemental retirement, severance, golden parachute, vacation, cafeteria, dependent care, medical care, employee assistance program, education or tuition assistance programs, insurance and other similar compensation, fringe or employee benefit plans, programs or arrangements, and any current or former employment or executive compensation or severance agreements, written or otherwise, for the benefit of, or relating to, any present or former Employee of the Company, any subsidiary of the Company, or any trade or business (whether or not incorporated) which is a member of a controlled group or which is under common control with the Company within the meaning of Section 414 of the Code and the regulations promulgated thereunder (an "ERISA Affiliate") and all other written or formal plans or agreements involving direct or indirect compensation (including any employment agreements entered into between the Company and any Employee, but excluding workers' compensation, unemployment compensation, other government-mandated programs and the Company's salary and wage arrangements) currently or previously maintained, contributed to or entered into by the Company, any subsidiary of the Company or any ERISA Affiliate thereof for the benefit of any Employee or former Employee under which the Company, any subsidiary of the Company or any ERISA Affiliate thereof has any present or future obligation or liability (the "Employee Plans"), whether or not such plan or arrangement has been terminated. The Company has provided to Parent true and complete copies of all Employee Plans (and, if applicable, related trust agreements) and all amendments thereto and written interpretations thereof, and (where applicable) (A) all summary plan descriptions, summaries of material modifications, and corporate resolutions related to such plans (B) the three most recent determination letters received from the IRS, (C) the three most recent Form 5500 Annual Reports, with all attachments, (D) the most recent audited financial statement and actuarial valuation, and (E) all related agreements, insurance contracts and other

agreements which implement each such Employee Plan. Any Employee Plan that individually or collectively would constitute an "employee pension benefit plan", as defined in Section 3(2) of ERISA, but which are not Multiemployer Plans (collectively, the "Pension Plans"), are identified as such in the Company Disclosure Schedule. For purposes of Section 3.1(u), "Employee" means any common law employee, consultant or director of the Company;

(ii) Each Employee Plan that is intended to be qualified under Section 401(a) of the Code is so qualified and each trust forming a part thereof is exempt from tax pursuant to Section 501(a) of the Code and nothing has occurred which may reasonably be expected to cause the failure of such qualification or exemption. Each Employee Plan has received or is the subject of a favorable determination letter from the IRS with respect to its qualified status, or the time for making application for a determination letter and remedial amendments with respect to such Employee Plan under Code Section 401(b) has not expired. There has been no material "prohibited transaction," as such term is defined in Section 406 of ERISA and Section 4975 of the Code, with respect to any Employee Plan; there are no claims pending (other than routine claims for benefits) or threatened against any Employee Plan or against the assets of any Employee Plan, nor are there any current or threatened liens on the assets of such plans; all Employee Plans conform to, and in their operation and administration are in all material respects in compliance with the requirements prescribed by any and all statutes (including ERISA and the Code), orders, or governmental rules and regulations currently in effect with respect thereto (including all applicable requirements for notification, reporting and disclosure to participants of the Department of Labor ("DOL"), Internal Revenue Service ("IRS") or Secretary of the Treasury), and the Company and each of its ERISA Affiliates have performed all material obligations required to be performed by them under, are not in default under or violation of, and have no knowledge of any default or violation by any other party to, any of the Employee Plans; all contributions required to be made to any Employee Plan pursuant to Section 412 of the Code, the terms of the Employee Plan or any collective bargaining agreement, have been made on or before their due dates and a reasonable amount has been accrued for contributions to each Employee Plan for the current plan years; the transaction contemplated herein will not directly or indirectly result in an increase of benefits, acceleration of vesting or acceleration of timing for payment of any benefit to any participant or beneficiary (except to the extent required under Code Section 411(d)(3)); neither the Company nor its ERISA Affiliates sponsor or maintain nor ever have sponsored or maintained an Employee Plan which includes a cash or deferred arrangement under Code section 401(k); each Employee Plan, if any, which is maintained outside of the United States has been operated in all material respects in conformance with the applicable statutes or governmental regulations and rulings relating to such plans in the jurisdictions in which such Employee Plan is present or operates and, to the extent relevant, the United States.

(iii) No Employee Plan constitutes or since the enactment of ERISA has constituted (A) a "multiemployer plan", as defined in Section 3(37) of ERISA (a "Multiemployer Plan") (B) a plan covered under Title IV of ERISA, or (C) a "multiple

employer plan," as defined in Section 413(c) of the Code. The Company has never incurred any material liability under Title IV of ERISA arising in connection with the termination of any Pension Plan or the complete or partial withdrawal from any Multiemployer Plan.

(iv) Each Employee Plan which is a "group health plan" (as defined in Section 5000 of the Code) has been maintained in material compliance with Section 4980B of the Code and Title I, Subtitle B, Part 6 of ERISA ("COBRA Coverage"), and no tax payable on account of Section 4980B of the Code has been or is expected to be incurred with respect to any current or former Employees of the Company. Each Employee Plan which is a group health plan has been maintained in compliance with Chapter 100, Subtitle K of the Code and Sections 701 through 707 of ERISA, Title XXII of the Public Health Service Act and the provisions of the Social Security Act, to the extent such requirements are applicable. Each Employee Plan that is subject to Section 1862(b) (1) of the Social Security Act has been operated in compliance with the secondary payor requirements of Section 1862(b)(1) of such Act.

(v) All contributions due and payable on or before the Closing Date in respect of any Employee Plan have been made in full and proper form, or adequate accruals in accordance with generally accepted accounting principles have been provided for in the Company Financial Statements for all other contributions or amounts in respect of the Employee Plans for periods ending on the Closing Date.

(vi) No Employee Plan currently or previously maintained by the Company, any of its subsidiaries or its ERISA Affiliates provides any post-termination health care or life insurance benefits (other than COBRA coverage), and neither the Company, any of its subsidiaries, nor its ERISA Affiliates has any obligations (whether written or real) to provide any post-termination benefits in the future (except for COBRA Coverage).

(vii) The consummation of the transactions contemplated by this Agreement will not (A) entitle any individual to severance or separation pay, or (B) except as set forth in the Section 3.1(u)(vii) of the Company Disclosure Schedule, accelerate the time of payment or vesting, or increase the amount, of compensation due to any individual.

(viii) With respect to each Employee Plan, (A) the Company or any of its subsidiaries has expressly reserved in itself the right to amend, modify or terminate any such Employee Plan, or any portion of it, and has made no representations (overtly or in writing) which would conflict with or contradict such reservation of right; and (B) the Company or any of its subsidiaries has satisfied any bond coverage requirement of ERISA.

(v) **Certain Agreements.** Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (i) result in any payment (including, without limitation, severance, unemployment compensation, golden parachute, bonus or otherwise) becoming due to any director or employee of the Company from the Company,

under any Employee Plan, Benefit Arrangement or otherwise. (ii) with respect to any current or former director, officer or Key Employee of the Company, materially increase any benefits otherwise payable under any Employee Plan or the Benefit Arrangement or (iii) result in the acceleration of the time of payment or vesting of any such benefits.

(w) **Insurance**. Section 3.1(w) of the Company Disclosure Schedule contains a list of all policies of liability, theft, fidelity, fire, product liability, errors and omissions, workmen's compensation, indemnification of directors and officers and other similar forms of insurance held by the Company (specifying the insurer, the amount of coverage, the type of insurance, the policy number and any pending claims thereunder) and a history of all claims made by the Company thereunder and the status thereof. All such policies of insurance are in full force and effect and all premiums with respect thereto are currently paid and, to the knowledge of the Company, no basis exists for termination of any thereof on the part of the insurer. The Company has not, since its inception, been denied or had revoked or rescinded any policy of insurance.

(x) **Bank Accounts; Powers of Attorney**. Section 3.1(x) of the Company Disclosure Schedule sets forth a true and complete list of (i) all bank accounts and safe deposit boxes of the Company and all persons who are signatories thereunder or who have access thereto and (ii) the names of all persons, firms, associations, corporations or business organizations holding general or special powers of attorney from the Company and a summary of the terms thereof.

(y) **Brokers**. The Company has not, nor have any of its officers, directors, securityholders or employees, employed any broker or finder or incurred any liability for any brokerage fees, commissions or finders' fees in connection with the transactions contemplated hereby.

(z) **Related Transactions**. No current or former director, officer or securityholder of the Company that is an affiliate of the Company or any associate (as defined in the rules promulgated under the Exchange Act) thereof, is now, or has been since the inception of the Company, a party to any transaction with the Company (including, but not limited to, any contract, agreement or other arrangement providing for the furnishing of services by, or rental of real or personal property from, or borrowing money from, or otherwise requiring payments to, any such director, officer or affiliated stockholder of the Company or associate thereof), or the direct or indirect owner of an interest in any corporation, firm, association or business organization which is a present or potential competitor, supplier or customer of the Company (other than non-affiliated holdings in publicly-held companies), nor does any such person receive income from any source other than the Company which relates to the business of, or should properly accrue to, the Company.

(aa) **Customers**. The Company generally has a good, ongoing relationship with its customers, and none of its customers has reduced, or expressed any intention of reducing, the dollar amount of its business with the Company or terminated, or expressed to the Company any intention of terminating, its business relationship with the Company.

(bb) **Minute Books.** The minute books of the Company provided to Parent for review contain a complete summary of all meetings of and actions by directors and stockholders of the Company from the time of its incorporation to the date of such review and reflect all actions referred to in such minutes accurately in all material respects.

(cc) **Business Generally.** There have been no events or transactions, or information which has come to the attention of the Company or any officer, director or Key Employee thereof not generally known to the public that could reasonably be expected to have a Company Material Adverse Effect, and the Company is not obligated under any contract or agreement or subject to any Charter or other corporate restriction which could have a Company Material Adverse Effect.

(dd) **Board Approval.** The Board of Directors of the Company has unanimously (i) approved this Agreement, the Merger and each of the Related Agreements to which the Company is a party and the transactions contemplated hereby and thereby, (ii) determined that the Merger is in the best interests of the stockholders of the Company and is on terms that are fair to such stockholders of the Company and (iii) recommended that the stockholders of the Company approve the Merger in accordance with the Agreement of Merger and the California Statute.

(ee) **Vote Required.** The affirmative vote of at least (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class, approving this Agreement, the Merger and the Agreement of Merger are the only votes of the holders of any class or series of the Company's capital stock necessary to approve this Agreement, the Merger and the Agreement of Merger and the transactions contemplated hereby and thereby.

(ff) **Information Supplied.** None of the information supplied or to be supplied by the Company for inclusion or incorporation by reference in the Stockholders' Materials will, at the dates mailed to the stockholders and at the Effective Time of the Stockholder Action, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading. The Stockholders' Materials will comply as to form in all material respects with the provisions of all applicable laws, rules and regulations of all Governmental Authorities.

(gg) **Pooling; Tax Matters.**

(i) The Company intends that the Merger be accounted for under the "pooling of interests" method under the requirements of Opinion No. 16 (Business Combinations) of the Accounting Principles Board of the American Institute of Certified Public Accountants, the Financial Accounting Standards Board, and the rules and regulations of the SEC.

(ii) To the knowledge of the Company, neither the Company nor any of its Affiliates has taken or agreed to take any action, failed to take any action or is aware of any fact or circumstance that would prevent (a) the Merger from being treated for financial accounting purposes as a "pooling of interests" in accordance with GAAP and regulations and interpretations of the SEC or (b) the Merger from constituting a reorganization within the meaning of Section 368(a) of the Code.

(iii) The Company has received a letter from PricewaterhouseCoopers LLP, dated as of the date hereof and addressed to the Company, a copy of which has been delivered to the Parent, in which PricewaterhouseCoopers LLP concurs with the Company management's conclusion that, as of the date hereof, no conditions exist related to the Company that would preclude Parent from accounting for the Merger as a "pooling of interests", and such letter has not been withdrawn or modified in any material respect.

(iv) Section 3.1(gg) of the Company Disclosure Schedule contains a true and complete list of all Persons who, to the knowledge of the Company, may be deemed to be Affiliates (as defined in Section 4.1(a) hereof) of the Company, including all directors and executive officers of the Company.

(hh) Disclosure. Neither Section 3.1 of this Agreement (including the Company Disclosure Schedule) nor any document, written information, statement, financial statement, certificate or exhibit furnished or to be furnished to Parent or Acquisition Sub by or on behalf of the Company pursuant hereto, contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary in order to make the statements or facts contained herein and therein not misleading in light of the circumstances under which they were made.

3.2 Several Representations and Warranties of the Stockholders. Each of the Stockholders, severally (and not jointly) represents and warrants to Parent, Acquisition Sub and the Company with respect to himself or itself as follows:

(a) Title; Absence of Certain Agreements. Such Stockholder is the lawful and record and beneficial owner of, and has good and marketable title to the shares of Company Stock set forth opposite the name of such Stockholder in Schedule I of the Company Disclosure Schedule, with the full power and authority to vote such Company Stock and transfer and otherwise dispose of such Company Stock, and any and all rights and benefits incident to the ownership thereof free and clear of all Encumbrances, and there are no agreements or understandings between such Stockholder and the Company and/or any other Stockholder or any other person with respect to the voting, sale or other disposition of Company Stock or any other matter relating to Company Stock, except for the Shareholder Agreements.

(b) Organization, Good Standing and Power. In the case of any Stockholder that is not a natural person, such Stockholder is duly organized or formed and validly existing under the laws of the jurisdiction of its incorporation or formation and has the corporate or other

organizational power and authority under such laws to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby.

(c) **Authority - General.** Such Stockholder has full and absolute power and authority to enter into this Agreement and, if applicable, each Related Agreement being executed and delivered by such Stockholder simultaneously herewith and this Agreement and each Related Agreement to which such Stockholder is a party, and has, in the case of a Stockholder that is not a natural person, been duly authorized by all requisite action on the part of such Stockholder; and this Agreement and each Related Agreement to which such Stockholder is a party has been duly executed and delivered by such Stockholder, and is the valid and binding obligation of such Stockholder, enforceable against such Stockholder in accordance with its terms. Neither the execution, delivery and performance of this Agreement and each Related Agreement to which such Stockholder is a party, nor the consummation of the transactions contemplated hereby or thereby nor compliance by such Stockholder with any of the provisions hereof or thereof will (i) (A) conflict with, (B) result in any violations of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, cancellation or acceleration of any obligation contained in or the loss of any material benefit under or (E) result in the creation of any Encumbrance upon or against any assets, rights or property of the Company (or against any Company Stock, Parent capital stock or common stock of the Surviving Corporation), under any term, condition or provision of (x) any agreement or instrument to which such Stockholder is a party, or by which such Stockholder or any of his or its properties, assets or rights may be bound, (y) any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to such Stockholder or any of his or its properties, assets or rights or (z) in the case of any Stockholder that is not a natural person, such Stockholder's Charter or by-laws, as amended through the date hereof, which conflict, breach, default or violation or other event would prevent the consummation of the transactions contemplated by this Agreement, the Agreement of Merger or any Related Agreement to which such Stockholder is a party. Except as set forth in Section 3.2(c) of the Company Disclosure Schedule (which, if so disclosed shall have been effectively made or obtained (as the case may be) on or prior to the Closing, unless otherwise waived by Parent) no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority or other person is required in connection with the execution, delivery and performance by such Stockholder of this Agreement, each Related Agreement to which such Stockholder is a party or the consummation by such Stockholder of the transactions contemplated hereby or thereby.

(d) **Investment Representations.**

(i) Such Stockholder:

(A) is acquiring the Merger Shares being issued to such Stockholder for investment and for such Stockholder's own account and not as a nominee or agent for any other person and with no present intention of distributing or reselling such shares or any part thereof in any transactions that would be in violation of the Securities Act or any state securities or "blue-sky" laws;

(B) understands (1) that the Merger Shares to be issued to him or it have not been registered for sale under the Securities Act or any state securities or "blue-sky" laws in reliance upon exemptions therefrom, which exemptions depend upon, among other things, the bona fide nature of the investment intent of such Stockholder as expressed herein, (2) that such Merger Shares must be held indefinitely and not sold until such shares are registered under the Securities Act and any applicable state securities or "blue-sky" laws, unless an exemption from such registration is available, (3) that, except as provided in the Registration Rights Agreement, Parent is under no obligation to so register such Merger Shares and (4) that the certificates evidencing such Merger Shares will be imprinted with a legend in the form set forth in Section 7.2(b) that prohibits the transfer of such shares, except as provided in Section 7.2;

(C) has been furnished with, and has read and reviewed, the Parent SEC Documents;

(D) has had an opportunity to ask questions of and has received satisfactory answers from the officers of Parent or persons acting on Parent's behalf concerning Parent and the terms and conditions of an investment in Parent Common Stock;

(E) is aware of Parent's business affairs and financial condition and has acquired sufficient information about Parent to reach an informed and knowledgeable decision to acquire the Merger Shares to be issued to him or it;

(F) can afford to suffer a complete loss of his or its investment in such Merger Shares;

(G) is familiar with the provisions of Rule 144 promulgated under the Securities Act which, in substance, permits limited public resale of "restricted securities" acquired, directly or indirectly, from the issuer thereof, in a non-public offering subject to the satisfaction of certain circumstances which require among other things: (1) the availability of certain public information about the issuer, (2) the resale occurring not less than one year after the party has purchased, and made full payment for, within the meaning of Rule 144, the securities to be sold; and, in the case of an affiliate, or of a non-affiliate who has held the securities less than two years, the amount of securities being sold during any three month period not exceeding the specified limitations stated therein, if applicable and (3) the sale being made through a broker in an unsolicited "broker's transaction" or in transactions directly with a market maker (as said term is defined under the Exchange Act);

(H) understands that in the event all of the applicable requirements of Rule 144 are not satisfied, registration under the Securities Act, compliance with Regulation A, or some other registration exemption will be required; and that, notwithstanding the fact that Rule 144 is not exclusive, the staff of the SEC has expressed

its opinion that persons proposing to sell private placement securities other than in a registered offering and otherwise than pursuant to Rule 144 will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales, and that such persons and their respective brokers who participate in such transactions do so at their own risk;

(I) has either alone or, in the case of those Stockholders identified in Section 3.2 (d) of the Company Disclosure Schedule, together with such Stockholder's "Purchaser Representative" (as such term is defined in Rule 501(h), as promulgated under the Securities Act) as to each such Purchaser, a "Purchaser Representative"), such knowledge and experience in financial and business matters that he or it is capable of evaluating the merits and risks of acquiring and holding shares of Parent Common Stock; and

(ii) Such Stockholder is an "accredited investor" within the meaning of Rule 501(a) under the Securities Act. If such Stockholder is identified in Section 3.2 (d) of the Company Disclosure Schedule, such Stockholder is being advised by a Purchaser Representative in connection with the transactions contemplated hereby.

(e) **Brokers**. No Stockholder has, nor have any of their officers, directors, securityholders or employees (if any), employed any broker or finder or incurred any liability for any brokerage fees, commissions or finders' fees in connection with the transactions contemplated hereby.

(f) **Accuracy of Representations and Warranties of the Company**. To the knowledge of such Stockholder, the representations and warranties of the Company set forth in Section 3.1, as modified by the Company Disclosure Schedule, are true, correct and complete in all material respects and the Company is not in breach or violation thereof.

(g) **Representation by Legal Counsel**. Such Stockholder has been advised by legal counsel in connection with the negotiation, execution and delivery of this Agreement, the Agreement of Merger and the Related Agreements and the performance of the transactions contemplated hereby an thereby.

3.3 **Several Representations and Warranties of the Founders**. Each of the Founders (as defined below) severally (and not jointly) represents and warrants to Parent, Acquisition Sub and the Company, with respect to himself, as follows:

(a) **Accuracy of Representations and Warranties of the Company**. Such Founder has carefully read and reviewed this Agreement and the Schedules and Exhibits hereto. To the knowledge of such Founder, all representations and warranties of the Company set forth in Section 3.1, as modified by the Company Disclosure Schedule, hereof are true, correct and complete in all material respects and the Company is not in breach or violation thereof.

(b) **Employment of Founders**. Neither the (i) current employment by, or association with, the Company, or future employment by, or association with, Parent or the Surviving Corporation of such Founder, or (ii) use, in connection with any business of the type presently conducted or proposed to be conducted by the Company, of any information or techniques presently utilized or proposed to be utilized by the Company or such Founders, violates, conflicts with, breaches or is prohibited under, or would violate, conflict with, breach or be prohibited under, any agreements or arrangements between such Founder and any other person, or any legal considerations applicable to unfair competition, trade secrets or confidential or proprietary information.

3.4 **Representations and Warranties of Parent and Acquisition Sub**. Parent and Acquisition Sub represent and warrant to the Company as follows:

(a) **Organization; Good Standing; Qualification and Power**. Each of Parent and Acquisition Sub (i) is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, (ii) has all requisite corporate power and authority to own, lease and operate its properties and assets and to carry on its business as now being conducted, to enter into this Agreement, the Agreement of Merger and each of the Related Agreements to which it is a party, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby and (iii) is duly qualified and in good standing to do business in the Commonwealth of Virginia and in all other jurisdictions where the failure to be so qualified and in good standing would have a material adverse effect on Parent or its business, properties, condition (financial or otherwise), assets, liabilities, operations, results of operations, prospects or affairs. Parent has delivered to the Company true and complete copies of the Charter and by-laws of each of Parent and Acquisition Sub.

(b) **Capital Stock**. Parent's Quarterly Report on Form 10-Q filed with the SEC with respect to the fiscal quarter ended March 31, 1999 (the "Form 10-Q"), sets forth a true and complete description of the authorized and outstanding shares of capital stock of Parent as of such date. Parent has duly authorized and reserved for issuance the Merger Shares, and, when issued in accordance with the terms of Article II, the Merger Shares will be validly issued, fully paid and nonassessable and free of preemptive rights (other than any Parent Rights which may be issued). There exist a sufficient number of authorized but unissued shares of Parent Common Stock to allow for the exercise in full of the Assumed Options, and such shares shall be reserved by Parent for issuance on the exercise of the Assumed Options. Parent owns all the outstanding shares of capital stock of Acquisition Sub, and all of such shares are validly issued, fully paid and nonassessable and not subject to preemptive rights.

(c) **Authority**. The execution, delivery and performance by Parent of this Agreement and each of the Related Agreements to which it is a party and the execution, delivery and performance of this Agreement and the Agreement of Merger by Acquisition Sub and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of Parent and Acquisition Sub, respectively. This Agreement and each of the Related Agreements to which Parent is a party and which have been delivered herewith are valid and binding obligations of Parent, enforceable against Parent in

accordance with their respective terms; and this Agreement and the Agreement of Merger are the valid and binding obligations of Acquisition Sub, enforceable against Acquisition Sub in accordance with their respective terms. Neither the execution, delivery and performance by Parent of this Agreement and the Related Agreements to which Parent is a party, the execution, delivery and performance of this Agreement and the Agreement of Merger by Acquisition Sub, nor the consummation of the transactions contemplated hereby or thereby, will in any material respect (A) conflict with, (B) result in any material violations of, (C) cause a material default under (with or without due notice, lapse of time or both), (D) give rise to any material right of termination, amendment, cancellation or acceleration of any obligation contained in or the loss of any material benefit under, (E) result in the creation of any material Encumbrance on or against any assets, rights or property of Parent or Acquisition Sub, as the case may be, under any term, condition or provision of (x) any material instrument or agreement to which Parent or Acquisition Sub is a party, or by which Parent or Acquisition Sub or any of their respective properties, assets or rights may be bound, (y) any material law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to Parent or Acquisition Sub or any of their respective properties, assets or rights or (z) Parent's or Acquisition Sub's Charter or by-laws, as amended through the date hereof, respectively, in each case, which conflict, breach, default or violation or other event would prevent the consummation of the transactions contemplated by this Agreement, the Agreement of Merger or any Related Agreement to which Parent or Acquisition Sub is a party. Except as contemplated by this Agreement, no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority or other person is required in connection with the execution, delivery and performance by Parent or Acquisition Sub of this Agreement, the Agreement of Merger (in the case of Acquisition Sub) or the Related Agreements to which they are a party or the consummation of the transactions contemplated hereby or thereby, other than (i) the filing with the SEC of such reports and information under the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), and the rules and regulations promulgated by the SEC thereunder, as may be required in connection with this Agreement and the transactions contemplated hereby, (ii) the filing of such documents with, and the obtaining of such orders from, various state securities and blue-sky authorities as are required in connection with the transactions contemplated hereby, (iii) the filing of the Agreement of Merger with the Secretary of State of the State of Delaware and the Secretary of State of the State of California and (iv) such other consents, waivers, authorizations, filings, approvals and registrations which if not obtained or made would materially impair the ability of Parent or Acquisition Sub to consummate the transactions contemplated by this Agreement, including, without limitation, the Merger (each of the actions reflected in clauses (i), (ii) and (iii) to be taken by Parent).

(d) SEC Documents.

(i) Parent has furnished or made available to the Company a correct and complete copy of Parent's Annual Report on Form 10-K filed with the SEC with respect to the fiscal year ended June 30, 1998 and the Form 10-Q and each report, schedule, registration statement and definitive proxy statement filed by Parent with the SEC on or after the date of filing of the Form 10-Q which are all the documents (other than

preliminary material) that Parent was required to file (or otherwise did file) with the SEC in accordance with Sections 13, 14 and 15(d) of the Exchange Act on or after the date of filing with the SEC of the Form 10-Q (collectively, the "Parent SEC Documents"). As of their respective filing dates, or in the case of registration statements, their respective effective times, none of the Parent SEC Documents (including all exhibits and schedules thereto and documents incorporated by reference therein) contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, and the Parent SEC Documents complied when filed, or in the case of registration statements, as of their respective effective times, in all material respects with the then applicable requirements of the Securities Act or the Exchange Act, as the case may be, and the rules and regulations promulgated by the SEC thereunder.

(ii) The financial statements (including the notes thereto) of Parent included in the Form 10-Q for the fiscal quarter then ended, complied as to form in all material respects with the then applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, were prepared in accordance with GAAP during the periods involved (except as may have been indicated in the notes thereto) and fairly present the financial position of Parent as at the dates thereof and the results of their operations, stockholders' equity and cash flows for the period then ended.

ARTICLE IV

RELATED AGREEMENTS

4.1 **Related Agreements**. The following agreements (such agreements being herein collectively referred to as the "Related Agreements") are being executed and delivered by the respective parties thereto and shall be delivered to Parent on or prior to the Closing (except for the Stockholders Agreements, which shall be delivered concurrently with the execution hereof),

(a) **Affiliate Agreements**. Each of the persons (within the meaning of Rule 145) who or which are, in Parent's reasonable judgment on the date hereof, "affiliates" of the Company within the meaning of Rule 145 of the rules and regulations promulgated by the SEC under the Securities Act ("Rule 145") or within the meaning of Accounting Series Release No. 130, as amended, Accounting Series Release No. 135 and Staff Accounting Bulletin No. 76 of the Commission and identified as such in Section 3.1(gg) of the Company Disclosure Schedule (each such person, an "Affiliate"), is entering or shall enter into a Company Affiliate Pooling Agreement with Parent, effective as of the date of execution (but not later than the Effective Time) (the "Company Affiliate Pooling Agreement"), in the form of Exhibit C attached hereto, providing, among other things, that such persons have not sold, exchanged, transferred, pledged or disposed of any Company Stock during the 30-day period prior to the Effective Time and shall not sell, exchange, transfer, pledge or dispose of their shares of Company Stock following the Effective Time except as provided therein and including a representation as to such person's intentions with respect thereto. Parent and Acquisition Sub shall be entitled to place legends on

the certificates evidencing any Parent Common Stock to be received by each Affiliate pursuant to the terms of this Agreement and the Agreement of Merger, and to issue appropriate stop transfer instructions to the transfer agent for Parent Common Stock, consistent with the terms of the Company Affiliate Pooling Agreements, whether or not the Company Affiliate Pooling Agreements are actually delivered to Parent.

(b) **Employee Confidentiality and Assignment of Inventions Agreements**. Each (i) equityholder of the Company who is expected to be an employee of Parent or the Surviving Corporation upon the Closing and (ii) employee of the Company who is expected to accept employment with Parent or the Surviving Corporation subsequent to the Closing, is entering, or shall enter, into a non-competition, confidentiality and assignment of inventions agreement with Parent, effective as of the Effective Time with respect to the group described in (i) and effective as of commencement of employment with respect to the group described in (ii), in the form of **Exhibit D** attached hereto (the "Employee Confidentiality Agreement"), providing for, among other things, restrictions upon such person from competing with the business of the Company, Parent and the Surviving Corporation, non-disclosure of confidential information and ownership of proprietary information and rights

(c) **Indemnity Escrow Agreement**. Each of Parent, the Stockholders' Committee and the Indemnity Escrow Agent are entering, or shall enter, into the Indemnity Escrow Agreement.

(d) **Founder Non-Competition Agreements**. Each of David Samuel and Joshua Felser, (each a "Founder" and together, the "Founders") is entering into an agreement with Parent, effective as of the Effective Time, in the form of **Exhibit E** attached hereto (the "Non-Competition Agreement"), providing for, among other things, restrictions upon such person from competing with the business of Parent and the Surviving Corporation.

(e) **Registration Rights Agreements**. The Stockholders' Committee, Parent and each stockholder are entering, or shall enter, into a Registration Rights Agreement effective as of the Effective Time, in the form of **Exhibit F** attached hereto (collectively, the "Registration Rights Agreements"), providing for registration rights with respect to the Merger Shares.

(f) **Release Agreements**. Each director, officer, employee and stockholder of the Company and holder of Convertible Securities is entering into a Release Agreement, effective as of the Effective Time, in the form of **Exhibit G** attached hereto (the "Release Agreements"), providing for, among other things, release of the Company, Parent and Parent's affiliates from any and all claims, known and unknown, that such Stockholder may have against the Company up to the time immediately preceding the Effective Time.

(g) **Shareholder Agreements**. Each of the Stockholders and Founders of the Company is entering into a Shareholder Agreement with Parent, effective as of the date hereof, in the form of **Exhibit H** attached hereto (collectively, the "Shareholder Agreements"), pursuant to which, among other things, such Stockholder shall agree to vote in favor of or consent in writing

to the Merger and shall not transfer their shares of Company Common Stock except in accordance with the Shareholder Agreement.

(h) **Shareholder Investment Representation Letter and Agreements**. Each of the stockholders of the Company is entering into a Shareholder Investment Representation Letter and Agreement with Parent in the form attached here to as **Exhibit I** pursuant to which, among other things, each stockholder of the Company shall make investment representations and other agreements with Parent.

(i) **Termination Agreement**. The stockholders of the Company identified on **Schedule 4.1(j)** attached hereto are entering, or shall enter, into a Termination Agreement, effective as of the Effective Time, with respect to the agreement(s) to which such stockholders and the Company are a party, each in the form of **Exhibit J** attached hereto (the "Termination Agreement").

ARTICLE V

CONDUCT AND TRANSACTIONS PRIOR TO EFFECTIVE TIME; ADDITIONAL AGREEMENTS

5.1 **Access to Records and Properties of Each Party; Confidentiality.**

(a) From and after the date hereof until the Effective Time or the earlier termination of this Agreement pursuant to Section 9.1 hereof (the "Executory Period"), the Company and the Stockholders and Founders shall permit Parent and its consultants and professional advisors to conduct, and assist Parent and its consultants and professional advisors in the conduct of, a full and complete investigation of the Company's business and technology including, without limitation, a market and competitive products and technology analysis and a review of the Company's books and records, contracts, technology, intellectual property, inventory, equipment, technical materials, customer records and other assets, reasonable, non-disruptive access to, and communications with current and former employees of the Company (the "Investigation"). The Investigation shall be conducted during normal business hours. Under no circumstances shall any information disclosed by the stockholders or the Company to Parent, or otherwise in Parent's possession, on or before the Effective Time, limit or restrict in any manner any right of Parent to terminate this Agreement upon the terms and conditions herein. All such information shall be subject to the confidentiality agreements currently existing between the parties; the Investigation shall not give Parent the right to use any disclosed or discovered information beyond the scope of these provisions or agreements or any applicable license agreement.

(b) Reference is made to the Confidential Non-Disclosure Agreement dated April 3, 1999, between Parent and the Company, which is hereby confirmed by the parties hereto and is and shall remain in full force and effect in accordance with its terms, and each of Parent and Company shall observe and perform its respective obligations thereunder.

5.2 Operation of Business of the Company. During the Executory Period, the Company shall operate its business as now operated and only in the normal and ordinary course and, consistent with such operation, will use its best efforts to preserve intact its business and assets, to keep available the services of its officers and employees and to maintain satisfactory relationships with persons having business dealings with it. Without limiting the generality of the foregoing, during the Executory Period, the Company shall not, without the prior written consent of Parent, (a) take any action that would result in any of the representations and warranties of the Company herein becoming untrue or in any of the conditions to the Merger not being satisfied, or (b) take or cause to occur any of the actions or transactions described in Section 3.1(g)(iii) through (xx).

5.3 Negotiation With Others. During the Executory Period, the Company shall not (and the Company shall not permit the Company's employees, directors, officers, advisors, consultants or agents to), and each of the Stockholders shall not, directly or indirectly: (i) solicit, initiate or engage in any discussions or negotiations with, whether or not initiated by the Company or any such Stockholder, or provide any information to, or take any other action with the intent to facilitate the efforts of, any third party relating to any possible agreement (whether binding or in principle) or other arrangement involving (1) the acquisition of the Company (whether by way of merger, purchase of capital stock, purchase of assets or otherwise); (2) any financing of, or investment in, including the purchase of any capital stock in, the Company; (3) the sale, license, disposition or encumbrance of any Intellectual Property of the Company; or (4) any action or agreement that would otherwise be inconsistent with the terms of this Agreement, the Agreement of Merger or the Related Agreements or that would prohibit the performance of the Company's or the Stockholders' obligations under this Agreement, the Agreement of Merger or the Related Agreements or that could reasonably be expected to diminish the likelihood of or render impracticable or undesirable the consummation of the Merger (each, a "Prohibited Transaction"); or (ii) authorize or consummate a Prohibited Transaction. In addition, upon execution and delivery of this Agreement, the Company and each Stockholder shall: (i) terminate any and all discussions, if any, it or he may be having regarding a Prohibited Transaction; and (ii) immediately notify Parent in writing if it or he thereafter receives any inquiries or offers from any person or entity regarding a Prohibited Transaction, which notice shall contain the identity of such person or entity, the nature of the Prohibited Transaction proposed and the material terms of the proposal, and the Company and each Stockholder shall refuse to discuss, and immediately reject such inquiry or offer.

5.4 Dissenting Stockholders. Prior to the Closing, the Company shall give Parent (a) prompt notice of any demand by stockholders (the "Dissenting Stockholders") for appraisal of their shares of Company Stock in accordance with the California Statute and (b) the opportunity to direct all negotiations and proceedings with respect to any such demands. Prior to the Closing, the Company shall not, except with the prior written consent of Parent, voluntarily make any payment with respect to, or settle or offer to settle, any such demands for payment.

5.5 Preparation of Filings. As promptly as practicable after the date of this Agreement, Parent and the Company shall properly prepare and file any filings required under the Exchange Act, the Securities Act or any other Federal or state laws and Parent shall properly

prepare and file any filings required under state securities or "blue sky" laws, in each case relating to the Merger and the transactions contemplated by this Agreement (collectively, the "Filings"). The Company shall promptly furnish Parent with all information concerning the Company and the stockholders of the Company as may be reasonably requested by Parent in connection with any action contemplated by this Section 5.5. The Parent and the Company will notify the other promptly of the receipt of any comments from any government officials for amendments or supplements to any Filing or for additional information and will supply the other with copies of all correspondence between such party or any of its representatives, on the one hand, and any government officials, on the other hand, with respect to the Merger or any Filing Parent and the Company shall promptly provide the other (or its counsel) with copies of all filings made by such party with any Governmental Authority in connection with this Agreement and the transactions contemplated hereby and thereby. The Filings shall comply in all material respects with all applicable requirements of law. Whenever any event occurs which should be set forth in an amendment or supplement to any Filing, Parent or the Company, as the case may be, shall promptly inform the other party of such occurrence and cooperate in filing with any government officials, and/or mailing to the Stockholders, such amendment or supplement.

5.6 Advice of Changes. During the Executory Period, the Company shall confer with Parent on a regular and frequent basis, report on operational matters and promptly advise Parent of any change, event or circumstance having, or which, insofar as can reasonably foreseen, could have a Company Material Adverse Effect or which could impair in any material respect (negatively or positively) its financial projections or forecasts.

5.7 Stockholder Approval. The Company shall (a) obtain in compliance with the California Statute and any other applicable law and the Company's Charter and By-laws the requisite approval of the stockholders of the Company after the mailing of the Stockholders' Materials by written consent for the purpose of obtaining the approval of the Merger, this Agreement and the transactions contemplated hereby (in either case, the "Stockholder Action"), (b) take or cause to be taken all such other action as may be required by the California Statute and any other applicable law in connection with the Merger and this Agreement, in each case as promptly as possible and (c) reasonably cooperate with and assist Parent and its representatives in taking any such actions as may reasonably be required to consummate the Merger, including obtaining the consent and approval of any third parties or governmental agencies. In connection with the Stockholder Action, the Company's Board of Directors shall unanimously recommend that the stockholders of the Company consent in writing to the Merger and the approval and adoption of this Agreement and shall take all reasonable actions necessary to solicit such approval. The Company shall prepare and distribute any written notice and other materials relating to the Stockholders' Action, in accordance with the Charter and by-laws of the Company, the California Statute and any other Federal and state laws relating to the Merger or any other transaction relating to or contemplated by this Agreement (collectively, the "Stockholders' Materials"); provided, however, that Parent and its counsel shall have the opportunity to review all Stockholders' Materials prior to delivery to the Stockholders of the Company, and all Stockholders' Materials shall be in form and substance reasonably satisfactory to Parent and its counsel; and provided further, that if any event occurs that should be set forth in an amendment or supplement to any Stockholders' Materials, the Company shall promptly inform Parent thereof

(or, if such event relates solely to Parent, Parent shall promptly inform the Company thereof), and the Company shall promptly prepare an amendment or supplement in form and substance satisfactory to Parent in accordance with the Charter and by-laws of the Company, the California Statute and any other Federal or state laws.

5.8 Legal Conditions to Merger. Each party hereto shall take all reasonable actions necessary to comply promptly with all legal requirements that may be imposed on such party with respect to the Merger and will take all reasonable actions necessary to cooperate with and furnish information to the other party or parties, as the case may be, in connection with any such requirements imposed upon such other party or parties in connection with the Merger. Each party hereto shall take all reasonable actions necessary (a) to obtain (and will take all reasonable actions necessary to promptly cooperate with the other party or parties in obtaining) any consent, authorization, order or approval of, or any exemption by, any Governmental Authority, or other third party, required to be obtained or made by such party (or by the other party or parties) in connection with the Merger or the taking of any action contemplated by this Agreement, (b) to defend, lift, rescind or mitigate the effect of any lawsuit, order, injunction or other action adversely affecting the ability of such party to consummate the transactions contemplated hereby and (c) to fulfill all conditions precedent applicable to such party pursuant to this Agreement.

5.9 Consents. Each party hereto shall use its best efforts, and the other parties shall reasonably cooperate with such efforts, to obtain any consents and approvals of, or effect the notification of or filing with, each person or authority, whether private or governmental, whose consent or approval is required in order to permit the consummation of the Merger and the transactions contemplated hereby and to enable the Surviving Corporation to conduct and operate the business of the Company substantially as presently conducted and as proposed to be conducted.

5.10 Efforts to Consummate. Subject to the terms and conditions herein provided, the parties hereto shall use their respective best efforts to do or cause to be done all such acts and things as may be necessary, proper or advisable, consistent with all applicable laws and regulations, to consummate and make effective the transactions contemplated hereby and to satisfy or cause to be satisfied all conditions precedent that are set forth in Article VI as soon as reasonably practicable, provided, however, that neither Parent nor any of its affiliates shall be under any obligation to (x) make proposals, execute or carry out agreements or submit to orders providing for the sale or other disposition or holding separate (through the establishment of a trust or otherwise) of any assets or categories of assets of Parent, any of its affiliates, the Company or the holding separate of the Company Stock or imposing or seeking to impose any limitation on the ability of Parent or any of its subsidiaries or affiliates to conduct their business or own such assets or to acquire, hold or exercise full rights of ownership of the shares Company Stock.

5.11 Notice of Prospective Breach. Each party hereto shall immediately notify the other parties in writing upon the occurrence of any act, event, circumstance or thing that is reasonably likely to cause or result in a representation or warranty hereunder to be untrue at the

Closing, the failure of a closing condition to be achieved at the Closing, or any other breach or violation hereof or default hereunder.

5.12 **Public Announcements.** The parties hereto agree that, to the maximum extent feasible, but subject to the public disclosure and other legal obligations of Parent and regulatory obligations to which each may be subject, they shall advise and confer prior to the issuance (and provide copies to the other party prior to issuance) of any public announcement or reports or statements with respect to the Merger; provided, however, that neither the Company nor any of its affiliates or representatives will issue any report, statement or release pertaining to this Agreement or any transaction contemplated hereby, without the prior written consent of the Parent.

5.13 **Support of Merger by Officers and Directors.** Each party hereto shall use its or his best efforts to cause all of its officers and directors to support the Merger and to take all actions and execute all documents reasonably requested by the other parties hereto to carry out the intent of the parties with respect to the transactions contemplated hereby.

5.14 **Support of Merger by Stockholders.** The Stockholders hereby agree to use all reasonable efforts to cause the Company to duly observe and perform its obligations under this Agreement

5.15 **Management and Employees.** Parent shall have the right to discuss and secure satisfactory assurances from management and certain other existing key employees of the Company that they will continue to be employed by the Surviving Corporation following the consummation of the Merger.

5.16 **Pooling Accounting.** The Merger is intended to be eligible for pooling-of-interest treatment for accounting purposes. In connection therewith, so long as the Merger is pending and prior to the Closing, the Company shall not knowingly, and shall not cause its respective directors, officers and stockholders to, take any action that could reasonably be expected to prevent the Merger from being accounted for as a pooling-of-interests, provided that the Company shall not be responsible for any action taken in accordance with the written advice of Parent that such action does not preclude pooling-of-interest treatment.

5.17 **Financial Statements.** The Company will provide Parent prior to the Effective Time with an unaudited balance sheet of the Company as of May 28, 1999.

ARTICLE VI

CONDITIONS PRECEDENT

6.1 **Conditions to Each Party's Obligations.** The obligations of each party to perform this Agreement and to effect the Merger are subject to the satisfaction of the following conditions unless waived (to the extent such conditions can be waived) by all parties hereto:

(a) Stockholder Approval; Agreement of Merger. This Agreement and the Merger shall have been duly and validly approved and adopted by the stockholders of the Company in accordance with the California Statute and the Company's Charter and By-laws, and the Agreement of Merger shall have been executed and delivered by Acquisition Sub and the Company and filed with and accepted by the Secretary of State of the State of Delaware and the Secretary of State of the State of California.

(b) Approvals. All authorizations, consents, orders or approvals of, or declarations or filings with or expiration of waiting periods imposed by any Governmental Authority necessary for the consummation of the transactions contemplated hereby shall have been obtained or made or shall have occurred.

(c) Legal Action. No temporary restraining order, preliminary injunction or permanent injunction or other order preventing the consummation of the Merger shall have been issued by any Federal or state court or other Governmental Authority and remain in effect.

(d) Legislation. No Federal, state, local or foreign statute, rule or regulation shall have been enacted which prohibits, restricts or delays the consummation of the transactions contemplated by this Agreement or any of the conditions to the consummation of such transactions.

(e) Tax Opinions. Parent and Company shall have received written opinions of Parent's legal counsel and Company's legal counsel, respectively, to the effect that the Merger will constitute a reorganization within the meaning of Section 368(a) of the Code, and such opinions shall not have been withdrawn. In rendering such opinions, counsel shall be entitled to rely upon, among other things, reasonable assumptions as well as representations of Parent, Acquisition Sub and Company, and Parent, Acquisition Sub and Company agree to provide reasonable and customary representations in connection with the issuance of such opinions.

6.2 Conditions to Obligations of Parent and Acquisition Sub. The obligations of Parent to perform this Agreement and of Acquisition Sub to perform this Agreement and the Agreement of Merger are subject to the satisfaction of the following conditions unless waived (to the extent such conditions can be waived) by Parent and Acquisition Sub:

(a) Representations and Warranties of the Company and the Stockholders. The representations and warranties of the Company, Stockholders and Founders set forth in Sections 3.1, 3.2 and 3.3 hereof, respectively, shall be true and correct in all material respects (except for any representation or warranty that by its terms is qualified by materiality, in which case it shall be true and correct in all respects) as of the date of this Agreement, and as of the Effective Time of the Stockholder Action and as of the Closing Date as though made at and as of such dates, respectively, and Parent and Acquisition Sub shall have received a certificate signed by the Chief Executive Officer of the Company and each Stockholder and each Founder, respectively, to that effect.

(b) **Performance of Obligations of the Company and the Stockholders.** The Company and the Stockholders shall have performed in all material respects the obligations required to be performed by it and them, respectively, under this Agreement prior to or as of the Closing Date, and Parent and Acquisition Sub shall have received a certificate signed by the Chief Executive Officer on behalf of the Company and each Stockholder and each Founder, respectively, to that effect.

(c) **Authorization of Merger.** All actions necessary to authorize the execution, delivery and performance of this Agreement, the Agreement of Merger and the Related Agreements by the Company and the consummation of the Merger and the other transactions contemplated hereby and thereby shall have been duly and validly taken by the Board of Directors of the Company, and the Company and the Stockholders shall have full power and right to effect the Merger on the terms provided herein.

(d) **Opinion of the Company's Counsel.** Parent and Acquisition Sub shall have received an opinion dated the Closing Date of Venture Law Group, counsel to the Company, in form and substance reasonably satisfactory to Parent and Acquisition Sub.

(e) **Acceptance by Counsel to Parent and Acquisition Sub.** The form and substance of all legal matters contemplated hereby and of all papers delivered hereunder shall be reasonably acceptable to the General Counsel of Parent and to Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., counsel to Parent and Acquisition Sub.

(f) **Auditors' Opinion.** Parent shall have received an opinion from Ernst & Young LLP, Parent's independent public accountants, and from PricewaterhouseCoopers LLP, the Company's independent accountants, each in form and substance satisfactory to Parent, dated the Closing Date, with respect to the financial accounting treatment of the Merger as a pooling of interests.

(g) **Consents and Approvals.** Parent and Acquisition Sub shall have received duly executed copies of all consents and approvals contemplated by this Agreement or the Company Disclosure Schedule, in form and substance satisfactory to Parent and Acquisition Sub.

(h) **Government Consents, Authorizations, Etc.** All consents, authorizations, orders or approvals of, and filings or registrations with, any Governmental Authority which are required for or in connection with the execution and delivery by the Company of this Agreement and the Related Agreements and the consummation by the Company of the transactions contemplated hereby and thereby shall have been obtained or made.

(i) **Related Agreements.** Each of the Related Agreements shall be in full force and effect as of the Effective Time and become effective in accordance with the respective terms thereof and the actions required to be taken thereunder by the parties thereto immediately prior to the Effective Time shall have been taken, and each person or entity who or which is required or contemplated by the parties hereto to be a party to any Related Agreement who or which did not theretofore enter into such Related Agreement shall execute and deliver such Related Agreement.

(j) **Absence of Material Adverse Change**. There shall have been no change having a Company Material Adverse Effect prior to the Closing.

(k) **Resignation of Directors**. The directors of the Company immediately prior to the Effective Time shall have resigned as directors of the Surviving Corporation effective as of the Effective Time.

(l) **Dissenters**. At least 98% of the stockholders of the Company shall have consented to the Merger and to send all of their capital stock to the Parent in accordance with the terms hereof, and none of the holders of the issued and outstanding shares of Company Stock (or such lesser amount as required in order to account for the Merger as a pooling-of-interests) shall have exercised, appraisal, dissenter's or similar rights of appraisal under the California Statute.

(m) **Waiver of Notice**. All of the preferred shareholders of the Company shall have waived their right to twenty (20) days prior written notice of the transactions contemplated by this Agreement.

(n) **Company Stock Plans**. The Company shall have taken all corporate and Stockholder action to approve and adopt any amendments to the Company Stock Plans necessary in the good faith reasonable judgment of Parent.

(o) **Shareholder Investment Representation Letter**. Each of the stockholders of the Company shall have executed and delivered the Shareholder Investment Representation Letter addressed to Parent in the form of **Exhibit I** hereto (the "Shareholder Investment Representation Letter").

(p) **Employment Offers**. Each person identified on **Schedule 6.2(p)** attached hereto (each a "Key Employee") shall have accepted an offer of employment with Parent or the Surviving Corporation in the form attached hereto as **Exhibit J** and on terms reasonably satisfactory to Parent and each such person.

(q) **Employment**. Ten (10) employees of the Company (other than the Key Employees) that have been offered employment by Parent shall have agreed to be employed by Parent or the Surviving Corporation on reasonable terms offered by Parent. Subject to Section 7.5, such terms shall include but not be limited to the right of such employees to participate in benefit programs, plans, arrangements and payroll practices (including vacation entitlement) offered to employees of Parent or established by the Surviving Corporation (the "Parent Employee Benefit Plans") in accordance with the applicable terms of each such plan with (i) credit for years of service with the Company for purposes of eligibility and vesting (except with respect to vesting of stock options) under each such Parent Employee Benefit Plan and (ii) amounts paid by such employees, before and during the calendar year of the Effective Time under any group medical plans of the Company taken into account and applied to the deductible, copayment and out-of-pocket limits applicable to such employees under any such group medical plan.

(r) **Company Affiliate Pooling Agreement.** Each of the persons or entities listed in Section 3.1(gg) of the Company Disclosure Schedule shall have executed and delivered a Company Affiliate Pooling Agreement with Parent.

(s) **Default Under Agreements.** The consummation of the transactions contemplated hereby shall not cause the Company to be in default under any material agreement or instrument to which it is a party or by which it or any of its properties are bound, the result of which could have a Company Material Adverse Effect.

(t) **Company Expenses.** A true, correct and complete schedule (the "Schedule of Expenses") of all Company Expenses (as defined in Section 10.1) (except, in the case of Venture Law Group, such schedule shall include an estimate of legal fees and expenses) paid or incurred by or on behalf of the Company through the Closing Date, accompanied by a certificate signed by the Chief Financial Officer of the Company certifying the accuracy and completeness thereof, shall have been delivered by the Company; and the Company shall have furnished evidence reasonably satisfactory to Parent that the stockholders of the Company have either paid directly or contributed to the Company in cash an amount equal, in the aggregate, to the amount of Company Expenses, subject to the second proviso, and last sentence, of Section 10.1 hereof.

(u) **Waiver of Right to Indemnification.** Each officer and director of the Company shall have executed and delivered to the Parent and Acquisition Sub an agreement, in form and substance reasonably satisfactory to Parent, pursuant to which such officer and director has agreed that he or she will not make any claim for indemnification against any of the Company or the Surviving Corporation and their respective subsidiaries by reason of the fact that he or she was a director, officer, employee, or agent of any such entity or was serving at the request of any such entity as a partner, trustee, director, officer, employee, or agent of another entity (whether such claim is for judgments, damages, penalties, fines, costs, amounts paid in settlement, losses, expenses, or otherwise and whether such claim is pursuant to any statute, charter document, bylaw, agreement, or otherwise) with respect to any action, suit, proceeding, complaint, claim or demand brought by any Indemnified Person or by any Stockholder against such officer or director in connection with this Agreement or the Related Agreements or the transactions contemplated hereby or thereby or the representations made herein or therein.

(v) **Exercise of Company Warrants.** The holders of each of the issued and outstanding Company Warrants shall have taken all necessary action to cause the exercise of all such warrants in full, and the Company shall have caused the issuance of all shares of Company Common Stock or Series C Preferred Stock, as the case may be, underlying such warrants.

(w) **Closing Date.** The Closing shall occur on or before May 28, 1999.

6.3 **Conditions to Obligations of the Company.** The obligations of the Company to perform this Agreement and the Agreement of Merger are subject to the satisfaction of the following conditions unless waived (to the extent such conditions can be waived) by the Company:

(a) **Representations and Warranties of Parent.** The representations and warranties of Parent and Acquisition Sub set forth in Section 3.3 hereof shall be true and correct in all material respects (except for any representation or warranty that by its terms is qualified by materiality, in which case it shall be true and correct in all respects) as of the date of this Agreement, and as of the Effective Time of the Stockholder Action and as of the Closing Date as though made at and as of such dates, respectively, and the Company shall have received a certificate signed by a Senior Vice President of Parent and the President of Acquisition Sub to that effect.

(b) **Performance of Obligations of Parent and Acquisition Sub.** Parent and Acquisition Sub shall have performed in all material respects their respective obligations required to be performed by them under this Agreement and the Agreement of Merger prior to or as of the Closing Date and the Company shall have received a certificate signed by the Senior Vice President of Parent and President of Acquisition Sub to that effect.

(c) **Related Agreements.** Parent shall have executed and delivered the Related Agreements to which it is a party and all other agreements to which Parent is to be party pursuant to the terms of Section 4.1.

(d) **Stock Certificates.** Parent shall have executed the Exchange Agent Agreement directing the Exchange Agent to deliver the Merger Shares in accordance with the terms of Article II.

(e) **Stockholder Approval.** This Agreement and the Merger shall have been approved by the affirmative vote of at least: (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series D Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class.

ARTICLE VII

ADDITIONAL AGREEMENTS

7.1 **Certain Information Required by the Code.** Each holder of Company Stock or Company Options who holds ten percent (10%) or more (by value) of the interests in the Company immediately prior to the Merger, within the meaning of Section 1060(e) of the Code, and who, in connection with the Merger, enters into a Non-Competition Agreement or other agreement with the Company or the Surviving Corporation (or is related to any person who enters into any such contract or agreement, within the meaning of Section 267(b) or Section 707(b)(1) of the Code) shall furnish Parent with any information required pursuant to Section 1060(e) of the Code at such time and in such manner as Parent may request in order to comply

with Section 1060(e) and any regulations promulgated thereunder. Parent and each such holder agree to file any reports required to be filed with the Internal Revenue Service and applicable state tax authorities consistent with the allocation of consideration provided for in this Agreement and agreements entered into in connection herewith and to take no position inconsistent with such allocation in any tax proceeding.

7.2 **Restriction on Transfer.**

(a) The shares of Parent Common Stock to be issued to each stockholder of the Company pursuant to the Merger and any shares of capital stock or other securities received with respect thereto (collectively, the "Restricted Securities") shall not be sold, transferred, assigned, pledged, encumbered or otherwise disposed of (each, a "Transfer") except upon the conditions specified in this Section 7.2, which conditions are intended to insure compliance with the provisions of the Securities Act. Each stockholder of the Company shall observe and comply with the Securities Act and the rules and regulations promulgated by the SEC thereunder as now in effect or hereafter enacted or promulgated, and as from time to time amended, in connection with any Transfer of Restricted Securities beneficially owned by the stockholder.

(b) Each certificate representing Restricted Securities issued to a stockholder of the Company and each certificate for such securities issued to subsequent transferees of any such certificate shall (unless otherwise permitted by the provisions of Sections 7.2(c) and 7.2(d) hereof) be stamped or otherwise imprinted with a legend in substantially the following form:

"THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY APPLICABLE STATE SECURITIES OR "BLUE-SKY" LAWS. THESE SECURITIES MAY NOT BE SOLD, TRANSFERRED, ASSIGNED, PLEDGED, ENCUMBERED OR OTHERWISE DISPOSED OF IN THE ABSENCE OF SUCH REGISTRATION OR AN EXEMPTION THEREFROM. ADDITIONALLY, THE TRANSFER OF THESE SECURITIES IS SUBJECT TO THE CONDITIONS SPECIFIED IN SECTION 7.2 OF THE AGREEMENT AND PLAN OF REORGANIZATION DATED AS OF MAY 28, 1999 AMONG AMERICA ONLINE, INC., ADAMS ACQUISITION SUB, INC., SPINNER NETWORKS INCORPORATED AND THE OTHER SIGNATORIES THERETO OR EXHIBIT A TO A SHAREHOLDER INVESTMENT REPRESENTATION LETTER BETWEEN AMERICA ONLINE, INC. AND FORMER STOCKHOLDERS OF SPINNER NETWORKS INCORPORATED AND NO TRANSFER OF THESE SECURITIES SHALL BE VALID OR EFFECTIVE UNTIL SUCH CONDITIONS HAVE BEEN FULFILLED. UPON THE FULFILLMENT OF CERTAIN OF SUCH CONDITIONS, AMERICA ONLINE, INC. HAS AGREED TO DELIVER TO THE

HOLDER HEREOF AN AMERICA ONLINE, INC. CERTIFICATE, NOT BEARING THIS LEGEND, FOR THE SECURITIES REPRESENTED HEREBY REGISTERED IN THE NAME OF THE HOLDER HEREOF. COPIES OF SUCH AGREEMENT MAY BE OBTAINED AT NO COST BY WRITTEN REQUEST MADE BY THE HOLDER OF RECORD OF THIS CERTIFICATE TO THE SECRETARY OF AMERICA ONLINE, INC."

(c) Upon approval of the Merger by the stockholders of the Company as contemplated hereby, each stockholder of the Company is deemed to agree (and by execution and delivery of this Agreement or the Shareholder Investment Representation Letter (as the case may be) each stockholder of the Company confirms its or his agreement) that, prior to any Transfer of Restricted Securities to give written notice to Parent of such stockholder's intention to effect such Transfer and to comply in all other respects with the provisions of this Section 7.2. Each such notice shall describe the manner and circumstances of the proposed Transfer and, if requested by Parent, shall be accompanied by the written opinion, addressed to Parent, of counsel for the holder of such Restricted Securities, stating that in the opinion of such counsel (which opinion and counsel shall be reasonably satisfactory to Parent) such proposed transfer does not involve a transaction requiring registration or qualification of such Restricted Securities under the Securities Act or the securities or "blue-sky" laws of any relevant state of the United States. The holder thereof shall thereupon be entitled to Transfer such Restricted Securities in accordance with the terms of the notice delivered by it to Parent. Each certificate or other instrument evidencing the securities issued upon the Transfer of any such Restricted Securities (and each certificate or other instrument evidencing any untransferred balance of such Restricted Securities) shall bear the legend set forth in Section 7.2(b) unless (x) in such opinion of counsel of Parent registration of any future Transfer is not required by the applicable provisions of the Securities Act or (y) Parent shall have waived the requirement of such legends. No stockholder of the Company shall Transfer any Restricted Securities until such opinion of counsel has been given (unless waived by Parent or unless such opinion is not required in accordance with the provisions of this Section 7.2(c)).

(d) Notwithstanding the foregoing provisions of this Section 7.2, the restrictions imposed by this Section 7.2 upon the transferability of Restricted Securities shall cease and terminate when (i) any such shares are sold or otherwise disposed of pursuant to an effective registration statement under the Securities Act or as otherwise contemplated by Section 7.2(c) and, pursuant to Section 7.2(c), the securities so transferred are not required to bear the legend set forth in Section 7.2(b) or (ii) the holder of such Restricted Securities has met the requirements for Transfer of such Restricted Securities pursuant to subparagraph (k) of Rule 144. Whenever the restrictions imposed by this Section 7.2 shall terminate, as herein provided, the holder of Restricted Securities as to which such restrictions have terminated shall be entitled to receive from Parent, without expense, a new certificate not bearing the restrictive legend set forth in Section 7.2(b) and not containing any other reference to the restrictions imposed by this Section 7.2.

(e) Each stockholder of the Company understands and agrees that Parent, at its discretion, may cause stop transfer orders to be placed with its transfer agent with respect to certificates for Restricted Securities owned by such stockholder but not as to certificates for such shares of Parent Common Stock as to which the legend set forth in paragraph (b) of this Section 7.2 is no longer required because one or more of the conditions set forth in Section 7.2(d) shall have been satisfied, in the event of a proposed transfer in violation or breach of this Section 7.2 or that is or may otherwise be unlawful.

7.3 Pooling. The Stockholders and the Company hereby acknowledge and agree that they shall not knowingly take, and shall not cause its or their directors, officers or shareholders, if applicable, to take any action (including, without limitation, the acceleration of vesting or exercisability of any employee stock options of the Company) that could prevent the Merger from being treated for financial accounting purposes as a "pooling-of-interest" under applicable rules and regulations, provided that the Stockholders and the Company shall not be responsible for any action taken in accordance with the written advice of Parent, that such action does not preclude pooling-of-interest treatment.

7.4 Confidentiality. The Company, the Founders and the Stockholders, acknowledge and recognize that the Subject Business (as defined below) has been conducted or is currently planned to be conducted by the Company throughout the world, and further acknowledge and recognize the highly competitive nature of the industry in which the Subject Business is involved and that, accordingly, in consideration of the premises contained herein, the consideration to be received hereunder and the direct and indirect benefits to the Company, the Founders and the Stockholders of the transactions contemplated hereby, and in consideration of and as an inducement to Parent and Acquisition Sub to enter into to this Agreement and to consummate the transactions contemplated hereby, from and after the Effective Time, the Company, the Founders and the Stockholders shall not (and shall cause each of their respective affiliates and subsidiaries, and the officers, directors, employees, equityholders, advisors and agents of them and their affiliates and subsidiaries not to) use or disclose to any Person, any Confidential Information or the terms and conditions of this Agreement, for any reason or purpose whatsoever, nor shall it or they make use of any of the Confidential Information for its own purposes or for the benefit of any Person except (i) in order to facilitate the fulfillment of such party's obligations hereunder, (ii) to Parent and the Surviving Corporation, (iii) as required by law or judicial process, (iv) as required to fulfill legal and regulatory obligations, if any or (v) to such party's attorneys, accountants, other advisors, officers, employees, directors and equityholders, as applicable, provided that such third party agrees to be bound by the confidentiality provisions hereof. For purposes of this Agreement, "Confidential Information" shall mean Intellectual Property Rights of the Company, the Surviving Corporation or Parent or its affiliates and all information of a proprietary nature relating to the Company, the Surviving Corporation or Parent or its affiliates or the Subject Business (other than information that is in the public domain at the time of receipt thereof by the Company, the Founders or the Stockholders or otherwise becomes public other than as a result of the breach by the Company, the Founders or the Stockholders of its agreement hereunder or is rightfully received from a third party without any obligation of confidentiality to Parent or the Company or is independently developed by the Company or the Shareholders) and the terms and conditions of this Agreement. As used herein, the term "Subject Business" shall

mean (i) the business of the Company or such business as is reasonably related to the business of the Company or is reasonably based on its technology and (ii) the business of Parent or any of its affiliates.

7.5 **Parent Employee Benefit Plans.** Parent represents and covenants to the Company as follows:

(a) Individuals who become employed by the Company or the Surviving Corporation pursuant to Sections 6.2(p) and (q) as of the Effective Time shall be referred to herein as "Affected Employees." Nothing contained herein shall be construed or deemed to limit the ability of either the Company, the Surviving Corporation or any other entity from terminating the employment either before or after the Effective Time of any such Affected Employee.

(b) Each Affected Employee will be eligible to participate in each Parent Employee Benefit Plan pursuant to the terms of each such Plan or, in the absence of plan terms or provisions, in accordance with the regularly established policies or procedures of either the Parent or the Surviving Corporation.

(c) The Parent will, or will cause the Surviving Corporation to, recognize the employment service of each Affected Employee with the Company for purposes of eligibility and vesting (but not benefit accrual) under any Parent Employee Benefit Plan to the same extent that such employment service was recognized by the Company prior to the Effective Time. Each Affected Employee's years of service shall be otherwise recognized for all general employment purposes including, without limitation, seniority, vacation, personal time and similar general employment purposes; provided, that any vacation time offered by the Parent or Surviving Corporation in the calendar year of the Effective Time to any Affected Employee shall be offset by any vacation time used by or paid to an Affected Employee by the Company in the calendar year of the Effective Time.

(d) Parent will, or will cause the Surviving Corporation to, (i) waive all limitations as to preexisting conditions, exclusions and waiting periods and service requirements with respect to participation and coverage requirements applicable to the Affected Employees under any group health plan sponsored by the Parent or the Surviving Corporation, except to the extent such preexisting condition period, exclusions, service requirements and waiting periods had not been satisfied by any such Affected Employee as of the Effective Time under a group health plan sponsored by the Company; and (ii) provide each Affected Employee with credit for any deductible, copayment and out-of-pocket limits applicable to such employees under any such group medical plan sponsored by the Company and paid by the Affected Employee prior to the Effective Time (as shown in the Company's records).

7.6 **Registration Statement on Form S-3.** Parent shall use its commercially reasonable efforts to file, following the Closing, a registration statement on Form S-3, as provided in the Form of Registration Rights Agreement set forth as Exhibit G hereto, with the SEC covering the resale of the shares of Parent Common Stock issued to holders of Company Stock pursuant to the Merger. Any such registration shall be subject to the terms and condition

set forth in the Registration Rights Agreement. Parent covenants that with respect to information contained in the registration statement and supplied by Parent in connection therewith, such information will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein not misleading, or omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading; provided, however, that the foregoing covenant of Parent shall not apply with respect to information contained in the registration statement and supplied in writing for inclusion in the registration statement by persons or entities who were shareholders of the Company immediately prior to the Effective Time.

ARTICLE VIII

INDEMNIFICATION

8.1 **Definitions.** As used in this Agreement, the following terms shall have the following meanings:

(a) "**Affiliate**" as to any person means any entity, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such person.

(b) "**Event of Indemnification**" shall mean the following:

(i) the untruth, inaccuracy or breach of any representation or warranty contained in Sections 3.1, 3.2 or 3.3 of this Agreement, or in the Company Disclosure Schedule, any Exhibit or Schedule hereto or any certificate delivered in connection herewith;

(ii) any claim, demand, liability or obligation arising out of the use by the Company of Licensed Software in the operation of the Company's business and products beyond the scope of the license (in terms of numbers of seats, users or servers);

(iii) the breach of any agreement or covenant of the Company, the Stockholders or the Founders contained in this Agreement or in the Company Disclosure Schedule, any Exhibit hereto or any certificate delivered in connection herewith; or

(iv) any claim, demand, liability or obligation sustained or suffered by the Company, Parent or the Surviving Corporation, or any of them, arising from or in connection with (A) the action of the stockholders of the Company required to approve the transactions contemplated by this Agreement, the Agreement and the Related Agreements, or (B) any assertion of impropriety by any stockholder of the Company against the Company, Parent or the Surviving Corporation, or any of them, with respect to any actions or transactions of or involving the Company prior to or at the Effective Time (including without limitation, the actions and transactions contemplated by this Agreement, the Agreement of Merger and the Related Agreements).

(c) "Indemnified Persons" shall mean and include Parent, Acquisition Sub and the Surviving Corporation and their respective Affiliates, successors and assigns, and the respective officers and directors of each of the foregoing

(d) "Indemnifying Persons" shall mean and include each of the stockholders of the Company and its or his respective successors, assigns, heirs and legal representatives and estates, as the case may be.

(e) "Losses" shall mean any and all losses, demands, actions or causes of action, suits, proceedings, investigations, arbitrations, claims, shortages, damages, liabilities (contingent or otherwise), payments, obligations, expenses (including reasonable attorneys' and accountants' fees), assessments, Taxes (including interest or penalties thereon) sustained, suffered or incurred by any Indemnified Person arising from or in connection with any such matter that is the subject of indemnification under this Article VIII.

8.2 Indemnification Generally.

(a) From and after the Effective Time, the Indemnifying Persons shall indemnify and hold harmless the Indemnified Persons, or any of them, from and against any and all Losses arising from or in connection with any Event of Indemnification; the full amount of such Losses (subject to the terms of Section 8.6) shall be paid to the Indemnified Persons from the Indemnity Escrow Fund (as defined in the Indemnity Escrow Agreement) in accordance with the terms and provisions of the Indemnity Escrow Agreement. For the purposes of determining the value of shares of Parent Common Stock to be delivered to Indemnified Persons out of the Indemnity Escrow Fund, each share of Parent Common Stock shall be valued at the Stipulated Price (as the same may be adjusted from time to time for stock splits or stock dividends of Parent). All other assets contained in the Indemnity Escrow Fund shall be valued at their fair market value as determined in accordance with the provisions of the Indemnity Escrow Agreement.

(b) The indemnification provisions contained in this Article VIII shall be the Indemnified Persons' exclusive remedies with respect to Events of Indemnification; provided, however, that nothing contained herein shall in any way limit, impair, modify or otherwise affect the rights of the Indemnified Persons (including rights available under the Securities Act or the Exchange Act) nor shall there be any limitation of liability of Indemnifying Persons in connection with any of such rights of the Indemnified Persons (A) to bring any claim, demand, suit or cause of action otherwise available to the Indemnified Persons based upon an allegation or allegations that the Company and/or the Indemnifying Persons, or any of them, had an intent to defraud or made a willful or intentional misrepresentation or willful omission of a material fact in connection with this Agreement, the Agreement of Merger or the Related Agreements and the transactions contemplated hereby or thereby (each a "Fraud Claim") or (B) to enforce any judgment of a court of competent jurisdiction which finds or determines that the Company and/or the Indemnifying Persons, or any of them, had an intent to defraud or made a willful misrepresentation or omission of a material fact in connection with this Agreement or the Agreement of Merger and the transactions contemplated hereby or thereby.

(c) Nothing herein shall limit the liability of the parties hereto for any breach of this Agreement prior to the Closing.

8.3 **Assertion of Claims.** No claim shall be brought under Section 8.2 hereof unless the Indemnified Persons, or any of them, at any time prior to the Survival Date, give the Stockholders' Committee (a) written notice of the existence of any such claim, specifying the nature and basis of such claim and the amount thereof, to the extent known or (b) written notice pursuant to Section 8.4 of any third party claim, the existence of which might give rise to such a claim but the failure so to provide such notice to the Stockholders' Committee will not relieve the Indemnifying Persons from any liability which they may have to the Indemnified Persons under this Agreement or otherwise (unless and only to the extent that such failure results in the loss or compromise of any rights or defenses of the Indemnifying Persons and they were not otherwise aware of such action or claim). Upon the giving of such written notice as aforesaid, the Indemnified Persons, or any of them, shall have the right to commence legal proceedings prior or subsequent to the Survival Date for the enforcement of their rights under Section 8.2 hereof.

8.4 **Notice and Defense of Third Party Claims.** Losses resulting from the assertion of liability by third parties (each, a "Third Party Claim") shall be subject to the following terms and conditions:

(a) The Indemnified Persons shall promptly give written notice to the Stockholders' Committee of any Third Party Claim that might give rise to any Loss by the Indemnified Persons, stating the nature and basis of such Third Party Claim, and the amount thereof to the extent known. Such notice shall be accompanied by copies of all relevant documentation with respect to such Third Party Claim, including, without limitation, any summons, complaint or other pleading that may have been served, any written demand or any other document or instrument. Notwithstanding the foregoing, the failure to provide notice as aforesaid to the Stockholders' Committee will not relieve the Indemnifying Persons from any liability which they may have to the Indemnified Persons under this Agreement or otherwise (unless and only to the extent that such failure directly results in the loss or compromise of any rights or defenses of the Indemnifying Person and they were not otherwise aware of such action or claim).

(b) The Indemnified Persons shall defend any Third Party Claims with counsel of their own choosing, and shall act reasonably and in accordance with their good faith business judgment in handling such Third Party Claims. The Stockholders' Committee and the Indemnifying Persons, on the one hand, and the Indemnified Persons, on the other hand, shall make available to each other and their counsel and accountants all books and records and information relating to any Third Party Claims, keep each other fully apprised as to the details and progress of all proceedings relating thereto and render to each other such assistance as may be reasonably required to ensure the proper and adequate defense of any and all Third Party Claims.

8.5 **Survival of Representations and Warranties.** Subject to the further provisions of this Section 8.5 and the last sentence of Section 8.3, the representations and warranties of the

take any action on behalf of the Stockholders pursuant to the authority granted to them under this Section 8.7.

(b) In the event of the death, physical or mental incapacity or resignation of any of the members of any of the Stockholders' Committee or a vacancy thereon for any other reason, the holders of a majority in interest of the Indemnity Escrow Shares shall promptly appoint a further substitute or substitutes and shall advise Parent thereof. As between the Stockholders' Committee and the stockholders of the Company, the members of the Stockholders' Committee shall not be liable for, and shall be indemnified by the Stockholders or provided with insurance against, any good faith error of judgment on their part or any other act done or omitted by them in good faith in connection with their duties as members of such Committee, except for gross negligence or willful misconduct. The Stockholders' Committee may consult with professional advisors of its choice. The Stockholders' Committee shall not be responsible for the genuineness or validity of any document and shall have no liability for acting in accordance with any written instructions given to them and believed by them to be signed by the proper parties. All expenses incurred by the members of the Stockholders' Committee in performing their duties (including fees and expenses of professional advisors) and any indemnification to be provided to the Stockholders' Committee shall be jointly and severally borne by the Stockholders.

ARTICLE IX

TERMINATION; AMENDMENT, MODIFICATION AND WAIVER

9.1 **Termination.** This Agreement may be terminated, and the Merger abandoned, notwithstanding the approval by Parent, Acquisition Sub and the Company of this Agreement, at any time prior to the Effective Time, by:

(a) the mutual consent of Parent, Acquisition Sub and the Company; or

(b) either Parent or Company, if the conditions set forth in Section 6.1 hereof shall not have been met by 5:00 p.m. (P.D.T.) on May 28, 1999, except if such conditions have not been met solely as a result of the action or inaction of the party seeking to terminate; or

(c) Parent and Acquisition Sub, if the conditions set forth in Section 6.2 hereof shall not have been met, and the Company if the conditions set forth in Section 6.3 hereof shall not have been met, in either case by 5:00 p.m. (P.D.T.) on May 28, 1999, except if such conditions have not been met solely as a result of the action or inaction of the party seeking to terminate; or

(d) either Parent or Company, if such party shall have determined in its sole discretion, exercised in good faith, that the Merger contemplated by this Agreement has become impracticable by reason of the institution of any litigation, proceeding or investigation to restrain or prohibit the consummation of the Merger, or which questions the validity or legality of the transactions contemplated by this Agreement.

(e) Parent and Acquisition Sub if any statute, rule, regulation or other legislation shall have been enacted which, in the sole judgment of Parent and Acquisition Sub, exercised reasonably and in good faith, materially adversely impairs the conduct or operation of the Company.

Any termination pursuant to this Section 9.1 (other than a termination pursuant to Section 9.1(a) hereof) shall be effected by written notice from the party or parties so terminating to the other parties hereto.

9.2 **Effect of Termination**. Except as provided in this Section 9.2, in the event of the termination of this Agreement pursuant to Section 9.1, this Agreement shall be of no further force or effect, except for Sections 5.1(b), 5.12, this Section 9.2 and Article X, each of which shall survive the termination of this Agreement; provided, however, that the liability of any party for any breach by such party of the representations, warranties, covenants or agreements of such party set forth in this Agreement occurring prior to the termination of this Agreement shall survive the termination of this Agreement.

9.3 **Specific Performance**. The transactions contemplated by this Agreement, including the Merger, are unique transactions and any failure on the part of the Company and the Stockholders to complete the transactions contemplated by this Agreement, including the Merger, on the terms of this Agreement will not be fully compensable in damages and the breach or threatened breach of the provisions of this Agreement would cause Parent irreparable harm. Accordingly, in addition to and not in limitation of any other remedies available to Parent for a breach or threatened breach of this Agreement, Parent will be entitled to specific performance of this Agreement upon any breach by the Company or the Stockholders, and to an injunction restraining any such party from such breach or threatened breach.

ARTICLE X

MISCELLANEOUS

10.1 **Expenses**. As used in this Agreement, "Transaction Costs" shall mean, with respect to any party, all actual, out-of-pocket expenses incurred by such party to third parties, in connection with this Agreement, the Merger and all other transactions provided for herein and therein; but shall not in any event include general overhead; the time spent by employees of such party internally; postage, telephone, telecopy, photocopy and delivery expenses; permit and filing fees; and other non-material expenses that are incidental to the ordinary course of business. Each party hereto shall bear its own fees and expenses in connection with the transactions contemplated hereby; provided, however, that in the event the Merger shall be consummated, (a) Parent and Acquisition Sub shall bear all Transaction Costs of Parent and Acquisition Sub and (b) the stockholders of the Company shall bear all Transaction Costs of the Company pro rata among such stockholders of the Company based on their former relative ownership of Company Stock, whether or not such fees and expenses have been paid by the Company or the stockholders of the Company on or before the Closing Date and whether or not such fees and expenses are reflected in the Company Disclosure Schedule or the Schedule of Expenses (such

Transaction Costs of the Company being herein collectively referred to as the "Company Expenses"). To effect the foregoing payment, Parent shall deduct from the $320,000,000 amount set forth in Section 2.1(A), the amount of all Company Expenses certified pursuant to Section 6.2(t), less $100,000 (the "Net Company Expenses").

10.2 **Entire Agreement.** This Agreement (including the Company Disclosure Schedule and the Exhibits attached hereto) and the other writings referred to herein contain the entire agreement among the parties hereto with respect to the transactions contemplated hereby and supersede all prior agreements or understandings, written or oral, among the parties with respect thereto.

10.3 **Interpretation.** Descriptive headings are for convenience only and shall not control or affect the meaning or construction of any provision of this Agreement. The words "include," "includes" and "including" when used herein shall be deemed in each case to be followed by the words "without limitation." The word "herein" and similar references mean, except where a specific Section or Article reference is expressly indicated, the entire Agreement rather than any specific Section or Article. The table of contents and the headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

10.4 **Knowledge Definition.** As used in this Agreement, the term "knowledge" and like phrases shall mean and include (i) actual knowledge and (ii) that knowledge which a prudent business person (including the officers, directors, and Key Employees) could have obtained in the management of his or her business affairs after making due inquiry and exercising due diligence with respect thereto. In connection therewith, the knowledge (both actual and constructive) of any officer, director, or Key Employee of the Company shall be imputed to be the knowledge of the Company.

10.5 **Notices.** All notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by nationally-recognized overnight courier or by registered or certified mail, postage prepaid, return receipt requested, or by electronic mail with a copy thereof to be delivered by mail (as aforesaid) within 24 hours of such electronic mail, or by telecopier, with confirmation as provided above addressed as follows:

(i) if to Parent or Acquisition Sub, to:

America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323
Telecopier: (703) 265-3004
Attention: Senior Vice President - Corporate Development

with a copy to:

Mintz, Levin, Cohn. Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
Telecopier: (617) 542-2241
E-mail: PSLawrence@Mintz.com
Attention: Peter S. Lawrence, Esquire

(ii) if to the Company, to:

Spinner Networks Incorporated
375 Alabama Street, Suite 350
San Francisco, CA 94110
Telecopier: (415) 703-0980
Attention: David Samuel

with a copy to:

Venture Law Group
2800 Sand Hill Road
Menlo Park, CA 94025
Telecopier: (650) 233-8386
E-Mail: stonsfeldt@venlaw.com
jgavenman@venlaw.com
Attention: Steven Tonsfeldt and
Jon Gavenman, Esquire

(iii) if to the Stockholders, at their respective addresses set forth on Schedule I anached hereto;

or to such other address as the party to whom notice is to be given may have furnished to the other party in writing in accordance herewith. All such notices or communications shall be deemed to be received (a) in the case of personal delivery, on the date of such delivery, (b) in the case of nationally-recognized overnight courier, on the next business day after the date when sent, (c) in the case of facsimile transmission or telecopier or electronic mail, upon confirmed receipt, and (d) in the case of mailing, on the third business day following the date on which the piece of mail containing such communication was posted.

10.6 Counterparts. This Agreement may be executed in any number of counterparts by original or facsimile signature, each such counterpart shall be an original instrument, and all such counterparts together shall constitute one and the same agreement.

10.7 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia applicable to contracts made and to be performed wholly therein.

10.8 Benefits of Agreement. All the terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. This Agreement shall not be assignable by any party hereto without the consent of the other parties hereto; provided, however, that anything contained herein to the contrary notwithstanding, Acquisition Sub may assign and delegate any or all of its rights and obligations hereunder to any other direct or indirect wholly-owned subsidiary of Parent; provided further, however, that any of the rights granted to and obligations of Parent under this Agreement (other than the payment of the Aggregate Consideration) may also be exercised or performed by any entity controlled by or under common control with Parent (each a "Parent Affiliate"); provided that such Parent Affiliate agrees to be bound by all of the applicable provisions hereof governing such exercise or performance and that the Company and Stockholders promptly receive written notice of any such exercise or performance.

10.9 Pronouns. As used herein, all pronouns shall include the masculine, feminine, neuter, singular and plural thereof whenever the context and facts require such construction.

10.10 Amendment, Modification and Waiver. This Agreement shall not be altered or otherwise amended except pursuant to (a) an instrument in writing signed by Parent and the Company, if Article VIII is not affected by such alteration or amendment and (b) an instrument in writing signed by (i) Parent, (ii) the Company and (iii) stockholders of the Company owning a majority (by voting power) of the outstanding shares of Company Stock held by all stockholders of the Company, if Article VIII is affected thereby; provided, however, that after the approval and adoption of this Agreement and the Merger by the stockholders of the Company, no amendment of this Agreement shall be made which pursuant to the California Statute or other law requires the further approval of the stockholders of the Company; provided further, however, that any party to this Agreement may waive in writing any obligation owed to it by any other party under this Agreement. The waiver by any party hereto of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach.

10.11 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties and the respective successors or assigns of the parties, any rights, remedies, obligations or liabilities whatsoever.

10.12 Consents. Except as otherwise expressly provided in this Agreement, any consent or approval of any party requested or permitted hereunder may be given or withheld in such party's sole discretion.

10.13 Interpretation. This Agreement has been negotiated between the parties and will not be deemed to be drafted by, or the product of, any party. As such, this Agreement will not be interpreted in favor of, or against, any party.

10.14 No Joint Venture. No party hereto shall make any warranties or representations, or assume or create any obligations, on the other party's behalf except as may be expressly

permitted hereunder or in writing hy such other party. Each party hereto shall be solely responsible for the actions of all its respective employees, agents and representatives

[Remainder of this page intentionally left blank]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement and Plan of Reorganization to be executed on its behalf as of the day and year first above written.

AMERICA ONLINE, INC.

By: David M. Colburn
Name: David M. Colburn
Title: Senior Vice President, Business Affairs

ADAMS ACQUISITION SUB, INC.

By: David M. Colburn
Name: David M. Colburn
Title: President

SPINNER NETWORKS INCORPORATED

By: _____
Name:
Title:

[COUNTERPART SIGNATURE PAGES OF STOCKHOLDERS ARE ATTACHED HERETO]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement and Plan of Reorganization to be executed on its behalf as of the day and year first above written.

AMERICA ONLINE, INC.

By:_____
Name:
Title:

ADAMS ACQUISITION SUB, INC.

By:_____
Name:
Title:

SPINNER NETWORKS INCORPORATED

By:_____
Name: David Samuel
Title: Chief Executive Officer

[COUNTERPART SIGNATURE PAGES OF STOCKHOLDERS ARE ATTACHED HERETO]

SIGNATURE PAGE TO AGREEMENT
AND PLAN OF REORGANIZATION
(THE "AGREEMENT"), AMONG
AMERICA ONLINE, INC., ADAMS ACQUISITION SUB, INC.,
SPINNER NETWORKS INCORPORATED AND
THE OTHER PARTIES TO THE AGREEMENT

The undersigned hereby executes and delivers the Agreement, authorizes this signature page to be attached to a counterpart of the Agreement, and agrees to be bound by the Agreement; and this Signature Page together with the Signature Pages of America Online, Inc., Adams Acquisition Sub, Inc., Spinner Networks Incorporated and the other parties to the Agreement shall constitute counterpart copies of the Agreement in accordance with the terms of the Agreement.

NAME OF SIGNATORY

Allen & Company Incorporated
Print Name

Kim Wieland
Signature

Kim Wieland
Print Name

Managing Director and CFO
Print Title

COLLECTED

SIGNATURE PAGE TO AGREEMENT
AND PLAN OF REORGANIZATION
(THE "AGREEMENT"), AMONG
AMERICA ONLINE, INC., ADAMS ACQUISITION SUB, INC.,
SPINNER NETWORKS INCORPORATED AND
THE OTHER PARTIES TO THE AGREEMENT

The undersigned hereby executes and delivers the Agreement, authorizes this signature page to be attached to a counterpart of the Agreement, and agrees to be bound by the Agreement; and this Signature Page together with the Signature Pages of America Online, Inc., Adams Acquisition Sub, Inc., Spinner Networks Incorporated and the other parties to the Agreement shall constitute counterpart copies of the Agreement in accordance with the terms of the Agreement.

NAME OF SIGNATORY

ED Bennett
Print Name

E. Bennett
Signature

ED Bennett
Print Name

Print Title

COLLECTED

SIGNATURE PAGE TO AGREEMENT
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NAME OF SIGNATORY

David Bill
Print Name

Signature

Print Name

Print Title

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NAME OF SIGNATORY

DIGITAL VENTURES LIMITED
Print Name

Signature

JF MCKELLAR
Print Name

DIRECTOR
Print Title

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NAME OF SIGNATORY

SCOTT EPSTEIN
Print Name

Signature

SCOTT EPSTEIN
Print Name

SVP, MARKETING
Print Title

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NAME OF SIGNATORY

Josh Felser
Print Name

Signature

Josh Felser
Print Name

President
Print Title

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NAME OF SIGNATORY

INTEL CORPORATION
Print Name

Signature

Arvind Sodhani
Vice President and Treasurer
Print Name

Print Title

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NAME OF SIGNATORY

Bryant Levin
Print Name

Bryant Levin
Signature

Print Name

Print Title

COLLECTED

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NAME OF SIGNATORY

PACIFIC TECHNOLOGY VENTURES USA L.P.
Print Name

Signature

PATRICK KENEALY
Print Name

MANAGING MEMBER
Print Title

COLLECTED

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NAME OF SIGNATORY THE PHOENIX PARTNERS III L.P.
By: The Phoenix Management Partners III
its General Partner

Print Name

Signature

David B. Johnston

Print Name

General Partner

Print Title

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NAME OF SIGNATORY THE PHOENIX PARTNERS IIIB L.P.
By: The Phoenix Management Partners III
its General Partner

Print Name

Signature

David B. Johnston

Print Name

General Partner

Print Title

COLLECTED

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NAME OF SIGNATORY: THE PHOENIX PARTNERS IV LIMITED PARTNERSHIP
By: Phoenix Management IV, L.L.C.
its General Partner

Print Name

Signature

David B. Johnston

Print Name

Member

Print Title

COLLECTED

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NAME OF SIGNATORY

David Samuel
Print Name

Signature

David Samuel
Print Name

CEO
Print Title

COLLECTED

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NAME OF SIGNATORY

Sony Music Entertainment Inc.
Print Name

Signature

Thomas C. Tyrrell
Print Name

Senior Vice President, General Counsel
Print Title

Index of Defined Terms

State of Delaware

Office of the Secretary of State PAGE 1

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AGREEMENT OF MERGER, WHICH MERGES:

"ADAMS ACQUISITION SUB, INC.", A DELAWARE CORPORATION,

WITH AND INTO "SPINNER NETWORKS INCORPORATED" UNDER THE NAME OF "SPINNER NETWORKS INCORPORATED", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF CALIFORNIA, AS RECEIVED AND FILED IN THIS OFFICE THE TWENTY-EIGHTH DAY OF MAY, A.D. 1999, AT 5:25 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

Edward J. Freel, Secretary of State

3049554 8100M

991216085

AUTHENTICATION: 9775402

DATE: 05-28-99

COLLECTED

AGREEMENT OF MERGER dated as of May 28, 1999, between **ADAMS ACQUISITION SUB, INC.**, a Delaware corporation ("Acquisition Sub"), and **SPINNER NETWORKS INCORPORATED**, a California corporation (the "Company").

WHEREAS, the Board of Directors and stockholders of Acquisition Sub and the Board of Directors and shareholders of the Company have duly adopted and approved this Agreement, the Agreement and Plan of Reorganization dated as of May 28, 1999 (the "Reorganization Agreement") among America Online, Inc. a Delaware corporation ("Parent"), Acquisition Sub, which is a wholly-owned subsidiary of Parent, the Company and the other parties thereto and the business combination between Parent and the Company to be effected by the merger of Acquisition Sub with and into the Company, pursuant and subject to the terms and conditions of this Agreement, the Reorganization Agreement, the Delaware General Corporation Law (the "Delaware Statute") and the California General Corporation Law (the "California Statute"), whereby, among other things, the issued and outstanding shares of (i) Common Stock, no par value, of the Company (the "Company Common Stock"), (ii) Series A Preferred Stock, no par value, of the Company (the "Series A Preferred Stock"), (iii) Series B Preferred Stock, no par value, of the Company (the "Series B Preferred Stock"), (iv) Series C Preferred Stock, no par value, of the Company (the "Series C Preferred Stock") and (v) Series D Preferred Stock, no par value, of the Company (the "Series D Preferred Stock" and together with the Company Common Stock, the Series A Preferred Stock, the Series B Preferred Stock the Series C Preferred Stock and the Series D Preferred Stock, the "Company Stock") (other than shares held by Dissenting Shareholders), will be exchanged and converted into shares of common stock, $.01 par value, of Parent (the "Parent Common Stock") and the corresponding Parent Rights in the manner set forth in this Agreement, upon the terms and conditions set forth in this Agreement and the Reorganization Agreement; and

WHEREAS, for federal income tax purposes, it is intended that the Merger shall qualify as a tax-free reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code").

NOW, THEREFORE, in consideration of the mutual benefits to be derived from this Agreement and the Reorganization Agreement and the representations, warranties, covenants, agreements, conditions and promises contained herein and therein, the parties hereby agree as follows:

Section 1. **The Merger.** Acquisition Sub shall be merged with and into the Company (the "Merger"), which at and after the Effective Time shall be, and is sometimes herein referred to as, the "Surviving Corporation." Acquisition Sub and the Company are sometimes referred to as the "Constituent Corporations."

Section 2. **The Effective Time of the Merger.** The Merger shall become effective (the "Effective Time") upon the filing of this Agreement and the attached officers' certificates with the Secretary of State of the State of California pursuant to Section 1103 of the California Statute.

Section 3. **Effect of Merger.** At the Effective Time the separate existence of Acquisition Sub shall cease and Acquisition Sub shall be merged with and into the Surviving

Corporation, and the Surviving Corporation shall succeed, without other transfer, to all rights and property of each of the Constituent Corporations and shall be subject to all the debts and liabilities of the Constituent Corporations in the same manner as if the Surviving Corporation had itself incurred them, and be subject to all the restrictions, disabilities and duties of each of the Constituent Corporations as provided in (i) Section 259 of the Delaware Statute and (ii) the California Statute.

Section 4. Articles of Incorporation and By-Laws and Directors and Officers of Surviving Corporation. From and after the Effective Time, (i) the Articles of Incorporation of the Company shall be amended so that Article III of the Company's Articles of Incorporation shall read in its entirety as follows:

> "The total number of shares of all classes of stock which the corporation shall have authority to issue is 100, all of which shall consist of common stock, no par value,"

and so amended, shall be the Articles of Incorporation of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, (ii) the by-laws of the Company shall be the by-laws of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, the Articles of Incorporation or such by-laws, (iii) the directors of Acquisition Sub shall be the directors of the Surviving Corporation, unless and until removed, or until their respective terms of office shall have expired, in accordance with the California Statute, the Articles of Incorporation and the by-laws of the Surviving Corporation, as applicable and (iv) the officers of the Acquisition Sub shall be the officers of the Surviving Corporation, unless and until removed, or until their terms of office shall have expired, in accordance with the California Statute, the Articles of Incorporation and the by-laws of the Surviving Corporation, as applicable.

Section 5. Intentionally Left Blank.

Section 6. Intentionally Left Blank.

Section 7. Total Consideration; Effect on Capital Stock. The entire consideration (the "Aggregate Consideration") payable by Parent with respect to all outstanding shares of capital stock of the Company (the "Outstanding Shares") and for all options (whether vested or unvested), warrants, rights, calls, commitments or agreements of any character to which the Company is a party or by which it is bound calling for the issuance of shares of capital stock of the Company or any securities convertible into or exercisable or exchangeable for, or representing the right to purchase or otherwise receive, directly or indirectly, any such capital stock, or other arrangement to acquire, at any time or under any circumstance, capital stock of the Company or any such other securities (the "Convertible Securities"; and the Outstanding Shares and the Convertible Securities being sometimes herein collectively referred to as the "Fully Diluted Company Shares") shall be an aggregate of 2,613,999 shares of Parent Common Stock (the "Total Parent Share Amount").

At the Effective Time, subject and pursuant to the terms and conditions of this Agreement, by virtue of the Merger and without any action on the part of the Constituent Corporations or the holders of the capital stock of the Constituent Corporations:

(a) Capital Stock of Acquisition Sub. Each issued and outstanding share of common stock, $.01 par value per share, of Acquisition Sub shall be converted into one share of common stock, $.01 par value per share, of the Surviving Corporation.

(b) Cancellation of Certain Shares of Company Stock. Each share of Company Stock that is (A) owned by the Company as treasury stock, (B) authorized but unissued, (C) owned by any subsidiary of the Company or (D) owned by Parent directly or indirectly by any wholly owned subsidiary of Parent, shall be canceled and no Parent Common Stock or other consideration shall be delivered in exchange therefor. As used herein, "subsidiary" means any corporation, partnership, joint venture, limited liability company or other legal entity of which the Company, the Surviving Corporation, Parent or such other person, as the case may be, (either alone or through or together with any other subsidiary) owns, directly or indirectly, more than 50% of the stock or other equity interests the holders of which are generally entitled to vote for the election of the board of directors or other governing body of such corporate or other legal entity.

(c) Conversion and Exchange Ratio for Company Stock. Subject to Section 8, each share of Company Stock issued and outstanding at the Effective Time (other than shares canceled pursuant to Section 7(b) and shares held by Dissenting Shareholders, if any), including all accrued and unpaid dividends thereon, shall be exchanged and converted automatically into the right to receive a fraction (the "Exchange Ratio") of a share of Parent Common Stock, determined by dividing (i) 2,613,999 (the Total Parent Share Amount) by (ii) 12,622,894 (the "Fully Diluted Company Shares Amount"). The number of securities to be issued to each shareholder of the Company under this Section 7 shall be calculated by aggregating all shares of Company Stock held by each such shareholder, so that such number of securities to be issued shall be equal to the number of shares of Company Stock held by such shareholder multiplied by the Exchange Ratio, with cash paid in lieu of any fractional share of Parent Common Stock pursuant to Section 8(f) hereof. As of the Effective Time, all shares of Company Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares shall cease to have any rights with respect thereto, except the right to receive Parent Common Stock and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefore upon surrender of such certificate in accordance with Section 8 hereof.

All calculations pursuant to this Agreement shall be rounded to the nearest one-billionth (.000000001). Each share of Parent Common Stock to be issued upon conversion of shares of Company Stock in accordance with this Section 7 shall include the corresponding percentage of a right (the "Parent Rights") to purchase shares of Series A-1 Junior Participating Preferred Stock, $.01 par value, of Parent pursuant to the Rights Agreement dated as of May 12, 1998, as amended (the "Parent Rights Agreement"), between Parent and Bank Boston, N.A., as Rights Agent, a true and correct copy of which has been provided by Parent to the Company. All references in this Agreement to the Merger Shares shall be deemed to include the Parent Rights. The shares of Parent Common Stock to be issued upon the exchange and conversion of Company Stock in accordance with this Section 7(c) shall sometimes be hereinafter collectively referred to as the "Merger Shares." Subject to Section 8 with respect to Merger Shares, the Merger Shares subject to the rights of repurchase described in Section 9(c) shall be placed in escrow with the

Parent and shall be distributed in accordance with such shareholder's stock purchase agreement or stock option agreement with the Parent.

(d) **Shares of Dissenting Shareholders.** Shares of Company Stock that are outstanding immediately prior to the Effective Time and which are held by shareholders (each, a "Dissenting Shareholder") who shall not have voted in favor of the Merger or consented thereto in writing and who shall have demanded properly in writing appraisal for such shares in accordance with the California Statute and who shall not have withdrawn such demand or otherwise have forfeited appraisal rights (collectively, the "Dissenting Shares") shall not be converted into or represent the right to receive Parent Common Stock. Such shareholders shall be entitled to receive payment of the appraised value of such shares of Company Stock held by them in accordance with the provisions of the California Statute, except that all Dissenting Shares held by shareholders who shall have failed to perfect or who effectively shall have withdrawn or lost their rights to appraisal of such shares of Company Stock under the California Statute shall thereupon be deemed to have been converted into and to have become exchangeable, as of the Effective Time, for the right to receive, without any interest thereon, the Parent Common Stock, upon surrender, in the manner provided in Section 8(d), of the Company Certificate or Company Certificates that formerly evidenced such shares of Company Stock.

(e) **Adjustments for Capital Changes.** If, prior to the Effective Time, Parent or the Company recapitalizes through a subdivision of its outstanding shares into a greater number of shares, or a combination of its outstanding shares into a lesser number of shares, or reorganizes, reclassifies or otherwise changes its outstanding shares into the same or a different number of shares or other classes, or declares a dividend on its outstanding shares payable in shares of its capital stock or securities convertible into shares of its capital stock, then the Exchange Ratio will be adjusted appropriately so as to maintain the relative proportionate interests of the holders of shares of Company Stock and the holders of shares of Parent Common Stock.

Section 8. **Escrow Deposit; Exchange of Certificates.**

(a) **Exchange Agent.** EquiServe, L.P. shall act as exchange agent (together with any other agent or agents which Parent may appoint, the "Exchange Agent") in the Merger.

(b) Intentionally Left Blank.

(c) **Delivery of Common Stock By Parent.** As soon as practicable after the Effective Time, Parent shall make available to the Exchange Agent for exchange in accordance with this Section 8(c) ninety percent (90%) of the Merger Shares issuable to each shareholder of the Company pursuant to Section 7 in exchange for outstanding shares of Company Stock ("Exchange Agent Shares") and (ii) cash for fractional shares associated with the Exchange Agent Shares in amounts calculated according to Section 8(f) below. As soon as practicable after the Effective Time, Parent shall cause to be distributed to State Street Bank and Trust Company, (the "Indemnity Escrow Agent") (i) ten percent (10%) of the Merger Shares issuable to each shareholder of the Company pursuant to Section 7 in exchange for outstanding shares of Company Stock (collectively, the "Indemnity Escrow Shares") and (ii) cash for fractional shares associated with the Indemnity Escrow Shares in the name of the Indemnity Escrow Agent in amounts calculated according to Section 8(f) below. All calculations to determine the number of

Merger Shares to be delivered to the Exchange Agent and Indemnity Escrow Agent as aforesaid shall be rounded to the nearest whole share.

(d) Procedure for Exchange. Upon receipt by the Exchange Agent at or after the Effective Time from a shareholder of the Company of (i) a surrendered certificate or certificates which immediately prior to the Effective Time represented issued and outstanding shares of Company Stock (each, a "Company Certificate"), (ii) an executed letter of transmittal, in which, among other things, such holder agrees to be bound by Section 7.2(b) of the Reorganization Agreement and any other applicable restrictions on transfer of the Merger Shares represented by such Parent Certificate(s), including restrictions relating to the Indemnity Escrow Agreement, (iii) three (3) stock powers duly executed in blank and (iv) such other documents as may be reasonably required by Parent or the Exchange Agent; such shareholder shall be entitled to receive in exchange therefor a certificate or certificates (each a "Parent Certificate") representing the number of Merger Shares (less the Indemnity Escrow Shares attributable to such shareholder) representing that number of Merger Shares that such holder has the right to receive pursuant to Section 7 with respect to such Company Certificate upon its cancellation, together with any associated cash for fractional shares (less 10% of such cash attributable to the Indemnity Escrow Shares, which shall be deposited with the Indemnity Escrow Agent). All Indemnity Escrow Shares shall be held by, and distributed in accordance with, the terms and provisions of the Indemnity Escrow Agreement.

(e) Transfers of Ownership. In the event of a transfer of ownership of shares of Company Stock that is not registered on the transfer records of the Company, Parent Certificates representing the proper number of Merger Shares may be issued (subject to all escrow requirements contained in this Agreement) to a transferee if the Company Certificate representing such Company Stock is presented to the Exchange Agent, accompanied by all documents required to evidence and effect such transfer and by evidence that any applicable stock or other transfer taxes have been paid. Until surrendered as contemplated by this Section 8, each Company Certificate shall be deemed, on and after the Effective Time, to represent only the right to receive upon such surrender, Parent Certificates representing Merger Shares (subject to all escrow requirements contained in this Agreement) as contemplated by Section 7(a), without interest.

(f) Fractional Shares. No fractional shares of Parent Common Stock shall be issued in connection with the Merger, but in lieu thereof each holder of Company Stock who would otherwise be entitled to receive a fraction of a share of Parent Common Stock will receive from Parent, at such time as such holder has the right to receive a certificate representing Merger Shares as contemplated by Section 8(d) (but for the escrow requirements of Section 8(b) hereof), an amount of cash (without interest), rounded to the nearest cent, equal to (i) $122.15 (the "Stipulated Price") multiplied by (ii) the fraction of a share of Parent Common Stock otherwise issuable to such holder. The fractional interests of each shareholder of the Company will be aggregated so that no shareholder of the Company will receive cash in an amount equal or greater than the Stipulated Price.

(g) No Further Ownership Rights in Company Stock. All Merger Shares issued upon the surrender for exchange of shares of Company Stock in accordance with the terms of this Agreement shall be deemed to have been issued in full satisfaction of all rights pertaining to such

shares of Company Stock. If, after the Effective Time, any Company Certificate is presented to the Surviving Corporation, such Company Certificate shall be canceled and exchanged as provided in this Agreement.

(h) No Liability. Neither Parent, Acquisition Sub nor the Company shall be liable to any holder of shares of Company Stock or Parent Common Stock, as the case may be, for Merger Shares (or dividends or distributions with respect thereto) to be issued in exchange for Company Stock pursuant to this Section 8, if, on or after the expiration of six months following the Effective Time, such shares are delivered to a public official pursuant to any applicable abandoned property, escheat or similar law.

(i) Lost, Stolen or Destroyed Company Certificates. In the event any Company Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit to that effect by the person claiming such Company Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such person of a bond in such amount as Parent may reasonably direct as indemnity against any claim that may be made against it with respect to such Company Certificate, Parent will issue in exchange for such lost, stolen or destroyed Company Certificate the Merger Shares and cash in lieu of fractional shares deliverable in respect thereof pursuant to this Agreement.

Section 9. Conversion of the Company Employee Options; Other Securities.

(a) Subject to Section 9(e) and 7(c) of this Agreement, at the Effective Time, each of the Company's then outstanding employee and consultant stock options (collectively the "Company Options") which have not been terminated, exercised or otherwise converted as of the Effective Time (including the incentive stock options and non-qualified stock options under the 1997 Stock Plan (the "Company Stock Plan") to purchase Company Common Stock, by virtue of the Merger and without any further action on the part of any holder thereof, shall be assumed by Parent and substituted for an option to purchase a number of shares of Parent Common Stock determined by multiplying the number of shares of Company Common Stock covered by such Company Option immediately prior to the Effective Time by the Exchange Ratio (rounded down to the nearest whole number of shares), at an exercise price per share of Parent Common Stock equal to the exercise price in effect under such Company Option immediately prior to the Effective Time divided by the Exchange Ratio (rounded up to the nearest cent), which option to purchase Parent Common Stock shall contain the same term, status as an "incentive stock option" under Section 422 of the Code (if such Company Option was theretofore a Company incentive stock option), vesting schedule and otherwise be on substantially the same terms and conditions as set forth in the assumed Company Option (any such assumed Company Option being herein referred to as an "Assumed Option"). The parties intend that the assumption and conversion of Company Options under this Section 9 shall meet the requirements of Section 424(a) of the Code and this Section 9 shall be interpreted in a manner consistent with such interpretation.

(b) Except as set forth in Section 9(a), all outstanding shares of preferred stock or other securities of the Company that are convertible, directly or indirectly, into shares of Company Common Stock shall be converted into such Company Common Stock in accordance with the respective terms thereof effective immediately prior to the Closing and shall be included in the calculation of Fully Diluted Company Shares.

(c) Pursuant to this Section 9(c), the Company hereby assigns to Parent, effective immediately after the Effective Time, all "rights of repurchase" (as described in the stock purchase agreements and stock option agreements under the Company Stock Plan), with respect to all shares purchased under the Company Stock Plan or issued or issuable upon exercise of stock options granted to optionees under the Company Stock Plan, so that no shares of any type or nature shall vest, and no rights

Section 10. Intentionally Left Blank.

Section 11. Constituent Corporations.

(a) Organization of the Company.

(i) Incorporation. The Company was incorporated under the laws of the State of California on March 12, 1996.

(ii) Authorized Stock; Outstanding Securities. As of the record date for purposes of voting on the Merger, the authorized capital stock of the Company consisted of (A) 15,600,000 shares of Company Common Stock, of which 3,285,858 shares were issued and outstanding, (B) 500,000 shares of Series A Preferred Stock, of which 365,208 shares were issued and outstanding, (C) 1,200,000 shares of Series B Preferred Stock, of which 1,076,389 shares were issued and outstanding, (D) 2,700,000 shares of Series C Preferred Stock, of which 2,647,050 shares were issued and outstanding, and (E) 4,000,000 shares of Series D Preferred Stock, of which 3,809,518 shares were issued and outstanding (the shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock are, collectively, the "Company Preferred Stock"). The Company has reserved (A) 2,650,000 shares of Company Common Stock for issuance upon the exercise of Company Options, (B) 341,234 shares of Company Common Stock for issuance upon the exercise of warrants, (C) 25,000 shares of Series C Preferred Stock for issuance upon exercise of warrants and (E) 26,455 shares of Series D Preferred Stock for issuance upon exercise of warrants. As of the record date for purposes of voting on the Merger, each share of Company Preferred Stock was convertible into Company Common Stock on a one share for one share basis.

(b) Organization of Acquisition Sub

(i) Incorporation. Acquisition Sub was incorporated under the laws of the State of Delaware on May 21, 1999.

(ii) Authorized Stock. Acquisition Sub is authorized to issue an aggregate of three thousand (3,000) shares of Common Stock, $.01 par value ("Acquisition Sub Stock").

(iii) Outstanding Stock. As of the date of this Agreement, an aggregate of one hundred (100) shares of Acquisition Sub Stock are outstanding.

(c) Acquisition Sub Stockholder Approval. The sole stockholder of Acquisition Sub, as the holder of the number of shares of stock Acquisition Sub that would be necessary to authorize or take such action at a stockholder meeting, duly approved and adopted the Reorganization Agreement and this Merger Agreement without a meeting by written consent

dated May 28, 1999, in accordance with the provisions of Section 228 of the Delaware General Corporation Law.

(d) Company Shareholder Approval. The Reorganization Agreement and this Merger Agreement were duly approved and adopted, without a meeting by written consent dated May 28, 1999, in accordance with the provisions of Section 603 of the California General Corporation Law, by the holders of at least (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class.

Section 12. Amendment; Termination.

(a) This Agreement may be amended by the parties, by action taken by their respective Boards of Directors, at any time prior to the Effective Time. No amendment of this Agreement shall be made which pursuant to the Delaware Statute, California Statute or other law requires the further approval of the shareholders of either or both of the Constituent Corporations unless such approval has been obtained. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties.

(b) Notwithstanding the approval of this Agreement by the shareholders of Acquisition Sub and the shareholders of the Company, this Agreement may be terminated at any time prior to the Effective Time by mutual agreement of the Constituent Corporations. This Agreement shall terminate forthwith in the event that the Reorganization Agreement shall be terminated as therein provided. In the event of the termination of this Agreement as provided above, this Agreement shall be forthwith become void and there shall be no liability on the part of either Constituent Corporation or their respective officers or directors, except as otherwise provided in the Reorganization Agreement.

Section 13. Service of Process upon Delaware Secretary of State. The Company hereby agrees that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of Acquisition Sub, as well as for enforcement of any of its obligations arising from the Merger, including any suit or proceeding to enforce the right of any shareholders as determined in appraisal proceedings pursuant to Section 262 of the Delaware Statute (as applicable), and irrevocably appoints the Delaware Secretary of State as its agent to accept service of process in any such suit or proceeding, which process shall be mailed to the Company at the address provided in Section 15 below.

Section 14. Entire Agreement. This Agreement and the Reorganization Agreement and the other documents referenced therein contain the entire agreement among the parties hereto with respect to the transactions contemplated hereby and supersede all prior agreements or understandings, written or oral, among the parties with respect thereto.

Section 15. Notices. All notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by nationally-recognized overnight courier or by registered or certified mail, postage prepaid, return receipt requested, or by electronic mail, with a copy thereof to be delivered by mail (as aforesaid) within 24 hours of such electronic mail, or by telecopier, with confirmation as provided above addressed as follows:

(i) if to Acquisition Sub, to:

America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323
Attn: Senior Vice President - Corporate Development
Telecopier: (703) 265-3004

with a copy to:

America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323
Attn: General Counsel
Telecopier: (703) 265-2208

with a copy to:

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
Attn: Peter S. Lawrence, Esquire
Telecopier: (212) 542-2241;

(ii) if to the Company, to:

Spinner Networks Incorporated
375 Alabama Street, Suite 350
San Francisco, CA 94110
Attn: David Samuel
Telephone: (415) 934-2700
Telecopier: (415) 703-0980

with a copy to:

Venture Law Group
135 Commonwealth Ave.
Menlo Park, CA 94025
Attn: Steven Tonsfeldt, Esquire
Jon L. Gaverman, Esquire
Telephone: (650) 854-4488
Telecopier: (640) 233-8386

Section 16. Counterparts. This Agreement may be executed in any number of counterparts by original or facsimile signature, each such counterpart shall be an original instrument, and all such counterparts together shall constitute one and the same agreement.

[Remainder of this page intentionally left blank]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement of Merger to be executed and delivered on its behalf as of the date first above written.

ADAMS ACQUISITION SUB, INC.

By: _____
Name: J. Michael Kelly
Title: Vice President and Treasurer

By: _____
Name: Sheila A. Clark
Title: Secretary

SPINNER NETWORKS INCORPORATED

By: _____
Name:
Title:

By: _____
Name:
Title:

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement of Merger to be executed and delivered on its behalf as of the date first above written.

ADAMS ACQUISITION SUB, INC.

By: _____
Name:
Title:

By: _____
Name:
Title

SPINNER NETWORKS INCORPORATED

By: _____
Name: Josh Felser
Title: President

By: _____
Name: David Samuel
Title: Secretary

SECRETARY'S CERTIFICATE

I, Sheila A. Clark, Secretary of ADAMS ACQUISITION SUB, INC., a Delaware corporation (the "Corporation"), hereby certify that the Agreement of Merger dated May 26, 1999 between the Corporation and SPINNER NETWORKS INCORPORATED, to which this certificate is attached, was approved by the written consent of a majority of the outstanding stock entitled to vote thereon in accordance with Section 252 of the General Corporation Law of the State of Delaware.

Sheila A. Clark
Secretary

TRADOCS: 1207070.1 (svdqe01!.doc)

State of California

SECRETARY OF STATE

I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the attached transcript of 16 page(s) has been compared with the record on file in this office, of which it purports to be a copy, and that it is full, true and correct.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this day of

JUN - 3 1999

Bill Jones

Secretary of State

COLLECTED

AGREEMENT OF MERGER dated as of May 28, 1999, between **ADAMS ACQUISITION SUB, INC.**, a Delaware corporation ("Acquisition Sub"), and **SPINNER NETWORKS INCORPORATED**, a California corporation (the "Company").

MAY 2 8 1999

BILL JONES, Secretary of State

WHEREAS, the Board of Directors and stockholders of Acquisition Sub and the Board of Directors and shareholders of the Company have duly adopted and approved this Agreement, the Agreement and Plan of Reorganization dated as of May 28, 1999 (the "Reorganization Agreement") among America Online, Inc. a Delaware corporation ("Parent"), Acquisition Sub, which is a wholly-owned subsidiary of Parent, the Company and the other parties thereto and the business combination between Parent and the Company to be effected by the merger of Acquisition Sub with and into the Company, pursuant and subject to the terms and conditions of this Agreement, the Reorganization Agreement, the Delaware General Corporation Law (the "Delaware Statute") and the California General Corporation Law (the "California Statute"), whereby, among other things, the issued and outstanding shares of (i) Common Stock, no par value, of the Company (the "Company Common Stock"), (ii) Series A Preferred Stock, no par value, of the Company (the "Series A Preferred Stock"), (iii) Series B Preferred Stock, no par value, of the Company (the "Series B Preferred Stock"), (iv) Series C Preferred Stock, no par value, of the Company (the "Series C Preferred Stock") and (v) Series D Preferred Stock, no par value, of the Company (the "Series D Preferred Stock," and together with the Company Common Stock, the Series A Preferred Stock, the Series B Preferred Stock the Series C Preferred Stock and the Series D Preferred Stock, the "Company Stock") (other than shares held by Dissenting Shareholders), will be exchanged and converted into shares of common stock, $.01 par value, of Parent (the "Parent Common Stock") and the corresponding Parent Rights in the manner set forth in this Agreement, upon the terms and conditions set forth in this Agreement and the Reorganization Agreement; and

WHEREAS, for federal income tax purposes, it is intended that the Merger shall qualify as a tax-free reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code").

NOW, THEREFORE, in consideration of the mutual benefits to be derived from this Agreement and the Reorganization Agreement and the representations, warranties, covenants, agreements, conditions and promises contained herein and therein, the parties hereby agree as follows:

Section 1. The Merger. Acquisition Sub shall be merged with and into the Company (the "Merger"), which at and after the Effective Time shall be, and is sometimes herein referred to as, the "Surviving Corporation." Acquisition Sub and the Company are sometimes referred to as the "Constituent Corporations."

Section 2. The Effective Time of the Merger. The Merger shall become effective (the "Effective Time") upon the filing of this Agreement and the attached officers' certificates with the Secretary of State of the State of California pursuant to Section 1103 of the California Statute.

Section 3. Effect of Merger. At the Effective Time the separate existence of Acquisition Sub shall cease and Acquisition Sub shall be merged with and into the Surviving Corporation, and the Surviving Corporation shall succeed, without other transfer, to all rights and property of each of the Constituent Corporations and shall be subject to all the debts and liabilities of the Constituent Corporations in the same manner as if the Surviving Corporation had itself incurred them, and be subject to all the restrictions, disabilities and duties of each of the Constituent Corporations as provided in (i) Section 259 of the Delaware Statute and (ii) the California Statute.

Section 4. Articles of Incorporation and By-Laws and Directors and Officers of Surviving Corporation. From and after the Effective Time, (i) the Articles of Incorporation of the Company shall be amended so that Article III of the Company's Articles of Incorporation shall read in its entirety as follows:

> "The total number of shares of all classes of stock which the corporation shall have authority to issue is 100, all of which shall consist of common stock, no par value,"

and so amended, shall be the Articles of Incorporation of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, (ii) the by-laws of the Company shall be the by-laws of the Surviving Corporation, unless and until altered, amended or repealed as provided in the California Statute, the Articles of Incorporation or such by-laws, (iii) the directors of Acquisition Sub shall be the directors of the Surviving Corporation, unless and until removed, or until their respective terms of office shall have expired, in accordance with the California Statute, the Articles of Incorporation and the by-laws of the Surviving Corporation, as applicable and (iv) the officers of the Acquisition Sub shall be the officers of the Surviving Corporation, unless and until removed, or until their terms of office shall have expired, in accordance with the California Statute, the Articles of Incorporation and the by-laws of the Surviving Corporation, as applicable.

Section 5. Intentionally Left Blank.

Section 6. Intentionally Left Blank.

Section 7. Total Consideration; Effect on Capital Stock. The entire consideration (the "Aggregate Consideration") payable by Parent with respect to all outstanding shares of capital stock of the Company (the "Outstanding Shares") and for all options (whether vested or unvested), warrants, rights, calls, commitments or agreements of any character to which the Company is a party or by which it is bound calling for the issuance of shares of capital stock of the Company or any securities convertible into or exercisable or exchangeable for, or representing the right to purchase or otherwise receive, directly or indirectly, any such capital stock, or other arrangement to acquire, at any time or under any circumstance, capital stock of the Company or any such other securities (the "Convertible Securities"; and the Outstanding Shares and the Convertible Securities being sometimes herein collectively referred to as the "Fully Diluted Company Shares") shall be an aggregate of 2,613,999 shares of Parent Common Stock (the "Total Parent Share Amount").

At the Effective Time, subject and pursuant to the terms and conditions of this Agreement, by virtue of the Merger and without any action on the part of the Constituent Corporations or the holders of the capital stock of the Constituent Corporations:

(a) Capital Stock of Acquisition Sub. Each issued and outstanding share of common stock, $.01 par value per share, of Acquisition Sub shall be converted into one share of common stock, $.01 par value per share, of the Surviving Corporation.

(b) Cancellation of Certain Shares of Company Stock. Each share of Company Stock that is (A) owned by the Company as treasury stock, (B) authorized but unissued, (C) owned by any subsidiary of the Company or (D) owned by Parent directly or indirectly by any wholly owned subsidiary of Parent, shall be canceled and no Parent Common Stock or other consideration shall be delivered in exchange therefor. As used herein, "subsidiary" means any corporation, partnership, joint venture, limited liability company or other legal entity of which the Company, the Surviving Corporation, Parent or such other person, as the case may be, (either alone or through or together with any other subsidiary) owns, directly or indirectly, more than 50% of the stock or other equity interests the holders of which are generally entitled to vote for the election of the board of directors or other governing body of such corporate or other legal entity.

(c) Conversion and Exchange Ratio for Company Stock. Subject to Section 8, each share of Company Stock issued and outstanding at the Effective Time (other than shares canceled pursuant to Section 7(b) and shares held by Dissenting Shareholders, if any), including all accrued and unpaid dividends thereon, shall be exchanged and converted automatically into the right to receive a fraction (the "Exchange Ratio") of a share of Parent Common Stock, determined by dividing (i) 2,613,999 (the Total Parent Share Amount) by (ii) 12,622,894 (the "Fully Diluted Company Shares Amount"). The number of securities to be issued to each shareholder of the Company under this Section 7 shall be calculated by aggregating all shares of Company Stock held by each such shareholder, so that such number of securities to be issued shall be equal to the number of shares of Company Stock held by such shareholder multiplied by the Exchange Ratio, with cash paid in lieu of any fractional share of Parent Common Stock pursuant to Section 8(f) hereof. As of the Effective Time, all shares of Company Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares shall cease to have any rights with respect thereto, except the right to receive Parent Common Stock and any cash in lieu of fractional shares of Parent Common Stock to be issued or paid in consideration therefore upon surrender of such certificate in accordance with Section 8 hereof.

All calculations pursuant to this Agreement shall be rounded to the nearest one-billionth (.000000001). Each share of Parent Common Stock to be issued upon conversion of shares of Company Stock in accordance with this Section 7 shall include the corresponding percentage of a right (the "Parent Rights") to purchase shares of Series A-1 Junior Participating Preferred Stock, $.01 par value, of Parent pursuant to the Rights Agreement dated as of May 12, 1998, as amended (the "Parent Rights Agreement"), between Parent and Bank Boston, N.A., as Rights Agent, a true and correct copy of which has been provided by Parent to the Company. All

references in this Agreement to the Merger Shares shall be deemed to include the Parent Rights. The shares of Parent Common Stock to be issued upon the exchange and conversion of Company Stock in accordance with this Section 7(c) shall sometimes be hereinafter collectively referred to as the "Merger Shares." Subject to Section 8 with respect to Merger Shares, the Merger Shares subject to the rights of repurchase described in Section 9(c) shall be placed in escrow with the Parent and shall be distributed in accordance with such shareholder's stock purchase agreement or stock option agreement with the Parent.

(d) Shares of Dissenting Shareholders. Shares of Company Stock that are outstanding immediately prior to the Effective Time and which are held by shareholders (each, a "Dissenting Shareholder") who shall not have voted in favor of the Merger or consented thereto in writing and who shall have demanded properly in writing appraisal for such shares in accordance with the California Statute and who shall not have withdrawn such demand or otherwise have forfeited appraisal rights (collectively, the "Dissenting Shares") shall not be converted into or represent the right to receive Parent Common Stock. Such shareholders shall be entitled to receive payment of the appraised value of such shares of Company Stock held by them in accordance with the provisions of the California Statute, except that all Dissenting Shares held by shareholders who shall have failed to perfect or who effectively shall have withdrawn or lost their rights to appraisal of such shares of Company Stock under the California Statute shall thereupon be deemed to have been converted into and to have become exchangeable, as of the Effective Time, for the right to receive, without any interest thereon, the Parent Common Stock, upon surrender, in the manner provided in Section 8(d), of the Company Certificate or Company Certificates that formerly evidenced such shares of Company Stock.

(e) Adjustments for Capital Changes. If, prior to the Effective Time, Parent or the Company recapitalizes through a subdivision of its outstanding shares into a greater number of shares, or a combination of its outstanding shares into a lesser number of shares, or reorganizes, reclassifies or otherwise changes its outstanding shares into the same or a different number of shares or other classes, or declares a dividend on its outstanding shares payable in shares of its capital stock or securities convertible into shares of its capital stock, then the Exchange Ratio will be adjusted appropriately so as to maintain the relative proportionate interests of the holders of shares of Company Stock and the holders of shares of Parent Common Stock.

Section 8. Escrow Deposit; Exchange of Certificates.

(a) Exchange Agent. EquiServe, L.P. shall act as exchange agent (together with any other agent or agents which Parent may appoint, the "Exchange Agent") in the Merger.

(b) Intentionally Left Blank.

(c) Delivery of Common Stock By Parent. As soon as practicable after the Effective Time, Parent shall make available to the Exchange Agent for exchange in accordance with this Section 8(c) ninety percent (90%) of the Merger Shares issuable to each shareholder of the Company pursuant to Section 7 in exchange for outstanding shares of Company Stock ("Exchange Agent Shares") and (ii) cash for fractional shares associated with the Exchange Agent Shares in amounts calculated according to Section 8(f) below. As soon as practicable after

the Effective Time, Parent shall cause to be distributed to State Street Bank and Trust Company, (the "Indemnity Escrow Agent") (i) ten percent (10%) of the Merger Shares issuable to each shareholder of the Company pursuant to Section 7 in exchange for outstanding shares of Company Stock (collectively, the "Indemnity Escrow Shares") and (ii) cash for fractional shares associated with the Indemnity Escrow Shares in the name of the Indemnity Escrow Agent in amounts calculated according to Section 8(f) below. All calculations to determine the number of Merger Shares to be delivered to the Exchange Agent and Indemnity Escrow Agent as aforesaid shall be rounded to the nearest whole share.

(d) Procedure for Exchange. Upon receipt by the Exchange Agent at or after the Effective Time from a shareholder of the Company of (i) a surrendered certificate or certificates which immediately prior to the Effective Time represented issued and outstanding shares of Company Stock (each, a "Company Certificate"), (ii) an executed letter of transmittal, in which, among other things, such holder agrees to be bound by Section 7.2(b) of the Reorganization Agreement and any other applicable restrictions on transfer of the Merger Shares represented by such Parent Certificate(s), including restrictions relating to the Indemnity Escrow Agreement, (iii) three (3) stock powers duly executed in blank and (iv) such other documents as may be reasonably required by Parent or the Exchange Agent; such shareholder shall be entitled to receive in exchange therefor a certificate or certificates (each a "Parent Certificate") representing the number of Merger Shares (less the Indemnity Escrow Shares attributable to such shareholder) representing that number of Merger Shares that such holder has the right to receive pursuant to Section 7 with respect to such Company Certificate upon its cancellation, together with any associated cash for fractional shares (less 10% of such cash attributable to the Indemnity Escrow Shares, which shall be deposited with the Indemnity Escrow Agent). All Indemnity Escrow Shares shall be held by, and distributed in accordance with, the terms and provisions of the Indemnity Escrow Agreement.

(e) Transfers of Ownership. In the event of a transfer of ownership of shares of Company Stock that is not registered on the transfer records of the Company, Parent Certificates representing the proper number of Merger Shares may be issued (subject to all escrow requirements contained in this Agreement) to a transferee if the Company Certificate representing such Company Stock is presented to the Exchange Agent, accompanied by all documents required to evidence and effect such transfer and by evidence that any applicable stock or other transfer taxes have been paid. Until surrendered as contemplated by this Section 8, each Company Certificate shall be deemed, on and after the Effective Time, to represent only the right to receive upon such surrender, Parent Certificates representing Merger Shares (subject to all escrow requirements contained in this Agreement) as contemplated by Section 7(c), without interest.

(f) Fractional Shares. No fractional shares of Parent Common Stock shall be issued in connection with the Merger, but in lieu thereof each holder of Company Stock who would otherwise be entitled to receive a fraction of a share of Parent Common Stock will receive from Parent, at such time as such holder has the right to receive a certificate representing Merger Shares as contemplated by Section 8(d) (but for the escrow requirements of Section 8(b) hereof), an amount of cash (without interest), rounded to the nearest cent, equal to (i) $122.15 (the

"Stipulated Price") multiplied by (ii) the fraction of a share of Parent Common Stock otherwise issuable to such holder. The fractional interests of each shareholder of the Company will be aggregated so that no shareholder of the Company will receive cash in an amount equal or greater than the Stipulated Price.

(g) No Further Ownership Rights in Company Stock. All Merger Shares issued upon the surrender for exchange of shares of Company Stock in accordance with the terms of this Agreement shall be deemed to have been issued in full satisfaction of all rights pertaining to such shares of Company Stock. If, after the Effective Time, any Company Certificate is presented to the Surviving Corporation, such Company Certificate shall be canceled and exchanged as provided in this Agreement.

(h) No Liability. Neither Parent, Acquisition Sub nor the Company shall be liable to any holder of shares of Company Stock or Parent Common Stock, as the case may be, for Merger Shares (or dividends or distributions with respect thereto) to be issued in exchange for Company Stock pursuant to this Section 8, if, on or after the expiration of six months following the Effective Time, such shares are delivered to a public official pursuant to any applicable abandoned property, escheat or similar law.

(i) Lost, Stolen or Destroyed Company Certificates. In the event any Company Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit to that effect by the person claiming such Company Certificate to be lost, stolen or destroyed and, if required by Parent, the posting by such person of a bond in such amount as Parent may reasonably direct as indemnity against any claim that may be made against it with respect to such Company Certificate, Parent will issue in exchange for such lost, stolen or destroyed Company Certificate the Merger Shares and cash in lieu of fractional shares deliverable in respect thereof pursuant to this Agreement.

Section 9. Conversion of the Company Employee Options; Other Securities.

(a) Subject to Section 9(c) and 7(c) of this Agreement, at the Effective Time, each of the Company's then outstanding employee and consultant stock options (collectively the "Company Options") which have not been terminated, exercised or otherwise converted as of the Effective Time (including the incentive stock options and non-qualified stock options under the 1997 Stock Plan (the "Company Stock Plan") to purchase Company Common Stock, by virtue of the Merger and without any further action on the part of any holder thereof, shall be assumed by Parent and substituted for an option to purchase a number of shares of Parent Common Stock determined by multiplying the number of shares of Company Common Stock covered by such Company Option immediately prior to the Effective Time by the Exchange Ratio (rounded down to the nearest whole number of shares), at an exercise price per share of Parent Common Stock equal to the exercise price in effect under such Company Option immediately prior to the Effective Time divided by the Exchange Ratio (rounded up to the nearest cent), which option to purchase Parent Common Stock shall contain the same term, status as an "incentive stock option" under Section 422 of the Code (if such Company Option was theretofore a Company incentive stock option), vesting schedule and otherwise be on substantially the same terms and conditions

as set forth in the assumed Company Option (any such assumed Company Option being herein referred to as an "Assumed Option"). The parties intend that the assumption and conversion of Company Options under this Section 9 shall meet the requirements of Section 424(a) of the Code and this Section 9 shall be interpreted in a manner consistent with such interpretation.

(b) Except as set forth in Section 9(a), all outstanding shares of preferred stock or other securities of the Company that are convertible, directly or indirectly, into shares of Company Common Stock shall be converted into such Company Common Stock in accordance with the respective terms thereof effective immediately prior to the Closing and shall be included in the calculation of Fully Diluted Company Shares.

(c) Pursuant to this Section 9(c), the Company hereby assigns to Parent, effective immediately after the Effective Time, all "rights of repurchase" (as described in the stock purchase agreements and stock option agreements under the Company Stock Plan), with respect to all shares purchased under the Company Stock Plan or issued or issuable upon exercise of stock options granted to optionees under the Company Stock Plan, so that no shares of any type or nature shall vest, and no rights

Section 10. Intentionally Left Blank.

Section 11. Constituent Corporations.

(a) Organization of the Company.

(i) Incorporation. The Company was incorporated under the laws of the State of California on March 12, 1996.

(ii) Authorized Stock; Outstanding Securities. As of the record date for purposes of voting on the Merger, the authorized capital stock of the Company consisted of (A) 15,600,000 shares of Company Common Stock, of which 3,285,858 shares were issued and outstanding, (B) 500,000 shares of Series A Preferred Stock, of which 365,208 shares were issued and outstanding, (C) 1,200,000 shares of Series B Preferred Stock, of which 1,076,389 shares were issued and outstanding, (D) 2,700,000 shares of Series C Preferred Stock, of which 2,647,050 shares were issued and outstanding, and (E) 4,000,000 shares of Series D Preferred Stock, of which 3,809,518 shares were issued and outstanding (the shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock are, collectively, the "Company Preferred Stock"). The Company has reserved (A) 2,650,000 shares of Company Common Stock for issuance upon the exercise of Company Options, (B) 341,234 shares of Company Common Stock for issuance upon the exercise of warrants, (C) 25,000 shares of Series C Preferred Stock for issuance upon exercise of warrants and (D) 26,455 shares of Series D Preferred Stock for issuance upon exercise of warrants. As of the record date for purposes of voting on the Merger, each share of Company Preferred Stock was convertible into Company Common Stock on a one share for one share basis.

(b) Organization of Acquisition Sub

(i) Incorporation. Acquisition Sale was incorporated under the laws of the State of Delaware on May 21, 1999.

(ii) Authorized Stock. Acquisition Sub is authorized to issue an aggregate of three thousand (3,000) shares of Common Stock, $.01 par value ("Acquisition Sub Stock").

(iii) Outstanding Stock. As of the date of this Agreement, an aggregate of one hundred (100) shares of Acquisition Sub Stock are outstanding.

(c) Acquisition Sub Stockholder Approval. The sole stockholder of Acquisition Sub, as the holder of the number of shares of stock Acquisition Sub that would be necessary to authorize or take such action at a stockholder meeting, duly approved and adopted the Reorganization Agreement and this Merger Agreement without a meeting by written consent dated May 28, 1999, in accordance with the provisions of Section 228 of the Delaware General Corporation Law.

(d) Company Shareholder Approval. The Reorganization Agreement and this Merger Agreement were duly approved and adopted, without a meeting by written consent dated May 28, 1999, in accordance with the provisions of Section 603 of the California General Corporation Law, by the holders of at least (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class.

Section 12. Amendment; Termination.

(a) This Agreement may be amended by the parties, by action taken by their respective Boards of Directors, at any time prior to the Effective Time. No amendment of this Agreement shall be made which pursuant to the Delaware Statute, California Statute or other law requires the further approval of the shareholders of either or both of the Constituent Corporations unless such approval has been obtained. This Agreement may not be amended except by an instrument in writing signed on behalf of each of the parties.

(b) Notwithstanding the approval of this Agreement by the shareholders of Acquisition Sub and the shareholders of the Company, this Agreement may be terminated at any time prior to the Effective Time by mutual agreement of the Constituent Corporations. This Agreement shall terminate forthwith in the event that the Reorganization Agreement shall be terminated as therein provided. In the event of the termination of this Agreement as provided above, this Agreement shall be forthwith become void and there shall be no liability on the part of either Constituent Corporation or their respective officers or directors, except as otherwise provided in the Reorganization Agreement.

Section 13. Service of Process upon Delaware Secretary of State. The Company hereby agrees that it may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of Acquisition Sub, as well as for enforcement of any of its obligations arising from the Merger, including any suit or proceeding to enforce the right of any shareholders as determined in appraisal proceedings pursuant to Section 262 of the Delaware Statute (as applicable), and irrevocably appoints the Delaware Secretary of State as its agent to accept service of process in any such suit or proceeding, which process shall be mailed to the Company at the address provided in Section 15 below.

Section 14. Entire Agreement. This Agreement and the Reorganization Agreement and the other documents referenced therein contain the entire agreement among the parties hereto with respect to the transactions contemplated hereby and supersede all prior agreements or understandings, written or oral, among the parties with respect thereto.

Section 15. Notices. All notices or other communications which are required or permitted hereunder shall be in writing and sufficient if delivered personally or sent by nationally-recognized overnight courier or by registered or certified mail, postage prepaid, return receipt requested, or by electronic mail, with a copy thereof to be delivered by mail (as aforesaid) within 24 hours of such electronic mail, or by telecopier, with confirmation as provided above addressed as follows:

(i) if to Acquisition Sub, to:

America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323
Attn: Senior Vice President - Corporate Development
Telecopier: (703) 265-3004

with a copy to:

America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323
Attn: General Counsel
Telecopier: (703) 265-2208

with a copy to:

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
Attn: Peter S. Lawrence, Esquire
Telecopier: (212) 542-2241;

(ii) if to the Company, to:

Spinner Networks Incorporated
375 Alabama Street, Suite 350
San Francisco, CA 94110
Attn: David Samuel
Telephone: (415) 934-2700

Telecopier: (415) 703-0980

with a copy to:

Venture Law Group
135 Commonwealth Ave.
Menlo Park, CA 94025
Attn: Steven Tonsfeldt, Esquire
Jon E. Gavenman, Esquire
Telephone: (650) 854-4488
Telecopier: (650) 233-8386

Section 16. Counterparts. This Agreement may be executed in any number of counterparts by original or facsimile signature, each such counterpart shall be an original instrument, and all such counterparts together shall constitute one and the same agreement.

[Remainder of this page intentionally left blank]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement of Merger to be executed and delivered on its behalf as of the date first above written.

ADAMS ACQUISITION SUB, INC.

By: _____
Name: J. Michael Kelly
Title: Vice President and Treasurer

By: _____
Name: Sheila A. Clark
Title: Secretary

SPINNER NETWORKS INCORPORATED

By: _____
Name:
Title:

By: _____
Name:
Title:

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement of Merger to be executed and delivered on its behalf as of the date first above written.

ADAMS ACQUISITION SUB, INC.

By: _____
Name:
Title:

By: _____
Name:
Title

SPINNER NETWORKS INCORPORATED

By: _____
Name: Josh Felser
Title: President

By: _____
Name: David Samuel
Title: Secretary

SPINNER NETWORKS INCORPORATED
OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

The undersigned, Josh Felser and David Samuel, and each of them, do hereby certify that:

1. They are the President and Secretary, respectively, of Spinner Networks Incorporated, a California corporation.

2. The Agreement of Merger attached to this Certificate providing for the merger of Adams Acquisition Sub, Inc., a Delaware corporation, with and into this corporation, was duly approved by the Board of Directors and shareholders of this corporation.

3. This corporation has authorized two classes of shares, designated "Common Stock" and "Preferred Stock". The number of shares of Common Stock outstanding and entitled to vote upon the merger was 3,285,858 shares. The number of shares of Series A Preferred Stock outstanding and entitled to vote upon the merger was 365,208 shares. The number of shares of Series B Preferred Stock entitled to vote upon the merger was 1,076,389 shares. The number of shares of Series C Preferred Stock entitled to vote upon the merger was 2,647,050 shares. The number of shares of Series D Preferred Stock entitled to vote upon the merger was 3,809,518.

4. The principal terms of the Agreement of Merger were approved by this corporation and by the vote of the holders of at least (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class.

IN WITNESS WHEREOF, the undersigned have executed this Certificate this 28 day of May, 1999.

Josh Felser, President

David Samuel, Secretary

Each of the undersigned further declares under penalty of perjury under the laws of the State of California that the matters set forth in this Certificate are true and correct of his/her own knowledge.

Executed at Menlo Park, California, on March 28, 1999

Josh Felser, President

David Samuel, Secretary

COLLECTED _____

ADAMS ACQUISITION SUB, INC.

OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

The undersigned, David M. Colburn and Sheila A. Clark, each of them, do hereby certify that:

1. They are the President and Secretary, respectively, of Adams Acquisition Sub, Inc., a Delaware corporation.

2. The Agreement of Merger attached to this Certificate providing for the merger of this corporation with and into Spinner Networks Incorporated, a California corporation, was duly approved by Board of Directors and by the sole stockholder of this corporation.

3. This corporation has one authorized class of shares, designated as Common Stock, par value $.01 per share. The number of shares of Common Stock outstanding and entitled to vote upon the merger was 100 shares.

4. The principal terms of the Agreement of Merger were approved by this corporation by the vote of America Online, Inc., the sole stockholder owning 100% of the outstanding shares of Common Stock of this corporation. The percentage vote required for such approval was more than 50% of the Common Stock.

5. No approval of the merger by outstanding shares of America Online, Inc., the owner of all of the outstanding shares of this corporation, is required.

IN WITNESS WHEREOF, the undersigned have executed this Certificate on May 28, 1999.

David M. Colburn, President

Sheila A. Clark , Secretary

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct and of our own knowledge.

Executed on May 28, 1999.

David M. Colburn, President

Sheila A. Clark , Secretary

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SPINNER NETWORKS INCORPORATED
OFFICERS' CERTIFICATE OF APPROVAL OF MERGER

The undersigned, Josh Felser and David Samuel, and each of them, do hereby certify that:

1. They are the President and Secretary, respectively, of Spinner Networks Incorporated, a California corporation.

2. The Agreement of Merger attached to this Certificate providing for the merger of Adams Acquisition Sub, Inc., a Delaware corporation, with and into this corporation, was duly approved by the Board of Directors and shareholders of this corporation.

3. This corporation has authorized two classes of shares, designated "Common Stock" and "Preferred Stock". The number of shares of Common Stock outstanding and entitled to vote upon the merger was 3,285,858 shares. The number of shares of Series A Preferred Stock outstanding and entitled to vote upon the merger was 365,208 shares. The number of shares of Series B Preferred Stock entitled to vote upon the merger was 1,076,389 shares. The number of shares of Series C Preferred Stock entitled to vote upon the merger was 2,647,050 shares. The number of shares of Series D Preferred Stock entitled to vote upon the merger was 3,809,518.

4. The principal terms of the Agreement of Merger were approved by this corporation and by the vote of the holders of at least (i) a majority of the outstanding shares of Company Stock, voting separately, (ii) a majority of the outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, (iii) a majority of the outstanding shares of the Series C Preferred Stock, voting separately, (iii) a majority of the outstanding shares of the Series D Preferred Stock, voting separately, and (v) a majority of the outstanding shares of Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock and Series D Preferred Stock, voting together as a single class.

IN WITNESS WHEREOF, the undersigned have executed this Certificate this 28 day of May, 1999.

Josh Felser, President

David Samuel, Secretary

COLLECTED

Each of the undersigned further declares under penalty of perjury under the laws of the State of California that the matters set forth in this Certificate are true and correct of his/her own knowledge.

Executed at Menlo Park, California, on May 28, 1999.

Josh Felser, President

David Samuel, Secretary

COLLECTED